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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES,

Plaintiffs-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York,

Defendant-Appellee.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Opinion Below

The court below was a three-judge court, appointed pursuant to 28 U. S. C. §§2282 and 2284, sitting in and for the Southern District of New York. It rendered a single opinion for all of the above-captioned actions. This opinion (R. 157-65) is reported in 125 F. Supp. 498.

Jurisdiction

(i) The actions herein were instituted for judicial review of a final agency action, pursuant to 5 U. S. C. §1009, in forms of proceeding authorized by 5 U. S. C. §1009(b). This appeal is from an order and judgment dismissing the complaints and denying motions for injunctions *pendente lite*.

(ii) The opinion and order of the court below was rendered and entered on October 11, 1954 (R. 165) and a judgment thereon made and entered on December 1, 1954 (R. 166). Notice of appeal herein was filed on December 7, 1954 (R. 169). The record and jurisdictional statement herein were filed on January 15, 1955. Probable jurisdiction was noted on January 31, 1955 (R. 183). 348 U. S. 925. On April 25, 1955, the appellants were informed by the Clerk of this Court, that, pursuant to Rule 41(1), this brief was due to be filed on August 25, 1955. By stipulation of the parties and order of the Clerk, dated August 5, 1955, the time to file was extended to September 9, 1955.

(iii) Jurisdiction of the appeal herein is conferred upon this Court by 28 U. S. C. §§2101 and 1253.

Statutes Involved

The statute of the United States whose validity is involved is 8 U. S. C. §1252(d) [Section 242(d) of the Immigration and Nationality Act of 1952; 66 Stat. 163]. The text of this section is as follows:

> "Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or here-

after issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or wilfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

The administrative regulation promulgated pursuant to authority purportedly granted by the statute and whose validity is challenged is 8 C. F. R. §242.3(c) [Section 242.3 (c) of the Immigration and Nationality Regulations]. The text of this regulation is as follows:

> "An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, district enforcement officer, or officer in charge having administrative jurisdiction over the office in which the detention or release of

such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of Section 242(d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:

(1) Appear from time to time at specified times or intervals before an officer of the Service for identification;

(2) Submit, if necessary, to medical and psychiatric examination at government expense;

(3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed."

Questions Presented

(1) Whether an action under the Administrative Procedure Act, 5 U. S. C. §1009, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, for judicial review of that order in the form of proceeding authorized by 5 U. S. C. §1009(b), presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution.

(2) Whether an action for declaratory judgment, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanc-

tions for violation of the order may be imposed only by criminal process.

(3) Whether, in the action set forth in (2) above, the party plaintiff is entitled to temporary or permanent auxiliary equitable relief from the order, where it is shown that compliance with the order has or will deprive the plaintiff of liberty, property and civil rights and that violation of the order would subject the plaintiff to multiple criminal penalties.

(4) Whether an action for injunction or mandamus, by a party to whom a final administrative order, embodying specific directives, has been issued, against the administrative officer who issued the order, to relieve the plaintiff from the obligations imposed upon him by the order, presents a case or controversy between the parties within the meaning of Article III, §2 of the United States Constitution, although sanctions for violation of the order may be imposed only by criminal process.

(5) Whether, in the action set forth in (4) above, it is a proper exercise of the court's discretion to grant relief, once the order—creating obligations, compliance with which deprives the plaintiff of liberty, property and civil rights and violation of which subjects him to multiple criminal penalties—is issued, although no violation of its terms has been committed and no criminal prosecution has been specifically threatened or begun.

(6) Whether 8 U. S. C. §1252(d), which attaches criminal consequences to an administratively found order of deportation and does not permit independent judicial inquiry into its validity, on its face, infringes upon procedural due process of law guaranteed by the Fifth Amendment, and, as applied to the deportation orders against the appellants which are based upon a finding of past membership in the Communist Party *eo nomine*, is a bill of attainder and *ex post facto* law.

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(7) Whether an alien, against whom a final administrative order of deportation has been outstanding for more than six months and whose deportation cannot be effected, subjected to "supervision", within the meaning of 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) on their face and as applied, is thereby deprived of liberty and property without due process of law, subjected to punishment and deprived of equal protection of the law all in violation of the Fifth Amendment, and deprived of rights of free speech and association in violation of the First and Fifth Amendments to the United States Constitution.

(8) Whether 8 U. S. C. §1252(d), on its face, unlawfully delegates legislative power to the Attorney General, and, as applied, constitutes an unlawful usurpation by him of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(9) Whether 8 U. S. C. §1252(d), on its face and as applied, is so vague and indefinite as to encompass within its terms, constitutionally protected conduct and activity in violation of the First and Fifth Amendments and as to give inadequate notice of the crime created by it in violation of the Fifth Amendment to the United States Constitution.

(10) Whether the orders issued to the appellants, which establish conditions of "supervision", pursuant to 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) are, on their face and as applied, unreasonable and an abuse of power, in violation of 8 U. S. C. §1252(d) and the Fifth Amendment to the United States Constitution.

Statement of the Case

The actions herein were brought by each of the appellants, under the Administrative Procedure Act, §1009 of Title 5, U. S. C., to review orders of Edward J. Shaughnessy, the District Director of the Third District of the Immigration and Naturalization Service, to wit: "Orders

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of Supervision" issued by him to each of the appellants pursuant to the authority purportedly vested in him by 8 U. S. C. §1252(d) and the regulations promulgated thereunder by the Attorney General: 8 C. F. R. §242.3(c) (R. 1-10).

Each of the appellants is the subject of a deportation proceeding, and against each of them there has been entered a final administrative order of deportation (R. 3). These orders were based on an administrative finding, in each instance, that, after entering the United States, each of the appellants had been a member of the Communist Party of the United States (R. 18, 25, 33, 40, 45, 56, 63, 71, 78, 85, 92, 99, 108, 116). In each case, more than six months had elapsed between the entry of the deportation order and the issuance of the "Order of Supervision" (R. 3).

Where more than six months elapse after the entry of a final administrative order of deportation against an alien, the provisions of 8 U. S. C. §1252(d) and 8 C. F. R. §242.3(c) require that the alien be placed under "supervision" as defined by their provisions. Under the alleged authority of the statute and regulations, the appellee made and issued an "Order of Supervision" against each of the appellants. These "Orders of Supervision" imposed regulations of and restrictions upon the conduct and activities of each of the appellants substantially as follows:[1]

> "That said alien shall upon request produce himself at a time and place designated for the purpose of submitting to medical and psychiatric examination and/or to furnish such information as may be deemed fit and proper.

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1. The court below recognized that: "The orders of supervision vary in certain unimportant respects, e.g., in the numbering of regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel limitation of 50 miles is omitted." (R. 162).

"That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] hereof of any change in residence or employment, within the immigration district, within 48 hours after change is made.

"That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service at the address shown in [the "order"] for permission to change place of residence from one immigration district to another, at least 48 hours prior to such change.

"That said alien shall report in [PERSON] on [day varies] of each week between 8:45 A.M. and 3:45 P.M. to the Officer in Charge of the Immigration and Naturalization Service at Ellis Island, New York Harbor, N. Y.

"That said alien shall terminate, and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any State, or of any foreign state, or any political or geographical sub-division of any state, any section, subsidiary, branch, affiliate or sub-division of any such group or organization.

"That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in paragraph 6.

"That said alien shall not violate Section 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code." (R. 3, App. Ex., R. 12-16).

The actions herein were commenced following the issuance of these orders (R. 3). The appellants, in effect, demanded "judicial review" of the "Orders of Supervision",

within the purview of 5 U. S. C. §1009(a), as "persons suffering legal wrong because of an agency action [and] adversely affected [and] aggrieved by such action." The complaints were bottomed upon the charge (1) that 8 U. S. C. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon the conduct and activities of the appellants incorporated therein, are unconstitutional, invalid, illegal, void and inoperative; and (2) that the regulations of and restrictions upon the conduct and activities of the appellants, incorporated in the "Orders of Supervision", are unreasonable and an abuse of power (R. 5-10).

The "forms of proceeding for judicial review" elected by the appellants, under the prescriptions of 5 U. S. C. §1009(b) were actions for: (1) a judgment declaring unconstitutional, invalid, illegal, void and inoperative: 8 U. S. C. §1252(d); 8 C. F. R. §242.3(c); the "Orders of Supervision"; and the regulations of and restrictions upon their conduct and activities incorporated in the "Orders of Supervision"; and (2) as auxiliary relief, an order that the appellee (a) be directed to set aside and cancel the "Orders of Supervision"; and (b) be enjoined and restrained from requiring the appellants (i) to submit to supervision as required by the "Orders of Supervision"; or (ii) to comply with the regulations of or restrictions upon their conduct and activities, incorporated in the "Orders of Supervision" (R. 10). By orders to show cause, the appellants moved for equitable relief *pendente lite* (R. 15-16).

The appellee cross-moved with respect to all fourteen complaints for an order: (1) dismissing the complaints, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, for failure to state claims upon which relief can be granted and for failure to join an indispensable party; (2) vacating and dissolving extant temporary restraining orders, pursuant to Rule 65(b) of the Federal

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Rules of Civil Procedure and 28 U. S. C. §2284(3); and (3) appointing a three-judge court, in accordance with the provisions of 28 U. S. C. §§2282 and 2284, to hear and determine the matters in issue (R. 124-26, 134, 135-37).

The appellee's application for the appointment of a three-judge court, unopposed by the appellants, was granted by orders dated June 21, 1954 (R. 145) and June 23, 1954 (R. 148). The case came on to be heard June 30, 1954 before Hon. HAROLD J. MEDINA, United States Circuit Judge, and Hon. JOHN F. X. MCGOHEY and Hon. EDWARD WEINFELD, United States District Judges (R. 150). On October 11, 1954, this court ordered that the complaints be dismissed for want of a justiciable controversy, the motions of the appellants for injunctions *pendente lite* denied, and the temporary restraining orders vacated (R. 165). A judgment to this effect was made and entered on December 1, 1954 (R. 166-68). The appeal herein is taken from this order and judgment.

Summary of Argument

1. The "orders of supervision" directed against the appellants and their promulgation by the appellee, are part of the regulatory scheme established by 8 U. S. C. §1252(d). They are final administrative orders. They fix specific responsibilities upon the appellants and impose an immediate direction of obedience by virtue of the legal consequences, which flow, by statute, from violation of their strictures. The legal authority of the appellee to make the orders is at issue between the parties. The Administrative Procedure Act makes such orders a matter of judicial cognizance in proceedings, as are in issue here, for a review of the orders' validity. These proceedings present a case and controversy in the constitutional sense and are, therefore, justiciable whether the form of proceeding is viewed as a special proceeding under the A.P.A. or a classic declaratory judgment or injunction action, all other requisite factors, as well, being present.

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2. Illegality of an alien's presence in the United States is made a vital element of the crime created by 8 U. S. C. §1252(d). The statute is invalid on its face as a violation of procedural due process under the Fifth Amendment, in that it makes the administrative decision on that element conclusive on the criminal trial court and permits its establishment without a jury or the full measure of criminal proof. The criminal consequences attached to a deportation order by the statute, as aforesaid, render it, as applied to the appellants, a bill of attainder and *ex post facto* law in violation of Article I, §9.

3. The power to detain an alien or to substitute conditions restrictive of his liberty, short of detention, may exist constitutionally only as an incident to and in aid of the power to deport or exclude. Where the deportation proceeding is at an end and the power to deport has become inviable—whether temporarily or permanently—the incidental and auxiliary power to detain or supervise must fall. The statute, and administrative regulations here provide for, and the orders impose, restrictions upon the appellants' liberty under circumstances where the power to deport had become inviable. The restrictions, imposed without judicial trial, are a deprivation of liberty and property and inflict punishment without due process of law and deprive the appellants of the equal protection of the laws, all in violation of the Fifth Amendment.

4. Section 1252(d) of 8 U. S. C. unlawfully delegates legislative power to the Attorney General—and, by re-delegation, to the appellee—in that its language granting power is a *carte blanche* and the section establishes no policy or rule or principle to limit or guide the Attorney General or the appellee in framing regulations which constitute his supervision of aliens. The appellee usurped legislative power by incorporating provisions which make criminal, acts which Congress has declared to be non-criminal, and impose punishment for criminal acts beyond the penalties prescribed by Congress.

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5. Section 1252(d) of 8 U. S. C. on its face is so vague and indefinite as to permit the imposition of restrictions of protected liberties, and as applied to the appellants by the "orders of supervision," impose restrictions on the appellants' rights under the First, Fourth and Fifth Amendments.

6. The restrictions upon the conduct and activity of the appellants by the "orders of supervision" are unreasonable, under the circumstances shown, in violation of 8 U. S. C. §1252(d) and the Fifth Amendment.

POINT I

A case and controversy exists between the parties to the actions herein.

The determination of the court below was made without reaching the merits of the controversy. It turned merely upon the resolution of a threshold jurisdictional question. The gravamen of its decision appears to be that:

> "The position of plaintiffs is untenable principally because there is no justiciable controversy between the parties. It is fundamental to declaratory judgment actions that there be an actual and existing dispute upon which the adjudicatory powers of the court can operate; and it has long been settled law that the constitutional powers of the courts do not give them competence to render advisory opinions. And yet that is precisely what plaintiffs here would have us do." (R. 163).

As this Court stated in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291 (1906): "The soundness of the doctrine relied upon is undoubted. * * * The difficulty is that the doctrine is inapplicable to this case. * * * "

Section 1009 of Title 5, U. S. C., a section of the Administrative Procedure Act, authorizes judicial review of

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the rectitude of administrative orders by persons "aggrieved" by them. It is this remedy that the appellants sought. The decision of the court below reveals an unawareness that this was the relief requested. The premises upon which its conclusion is founded that it is "to clear for reasonable debate" that there is a "lack of any actual and existing controversy between the parties plaintiff and defendant" (R. 165) demonstrate the court's erroneous conception of the instant actions as devices to relieve the appellants, either by way of declaratory judgment or injunctive orders, from criminal prosecution. The decision below rested upon *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947)—inapt in any event—an action for simple declaratory judgment and injunctive relief, thus re-inforcing the impression that the court below neglected to adjudicate the right of the appellants to the specific remedy for which they brought suit. Mr. Justice FRANKFURTER, concurring in *State of Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, 147 (1947), recognized the special character of the relief authorized by the review provisions of the Administrative Procedure Act and the need for their independent judicial interpretation.

> "The Administrative Procedure Act does not apply to the present case. * * * The Act will, in due course, present problems for adjudication. We ought not to anticipate them when, being irrelevant, they are not before us. The Act ought not to be used even for illustrative purpose because illustrations depend on construction of the Act. * * * "

The disposition of the court below to treat the appellants' demand for relief as so much surplusage, not only conflicts with such a view of the Administrative Procedure Act, but, in effect, repudiates its very existence. The empiric fact of its inscription on the statute books, however, is plain. The pattern for the construction of the section invoked by the appellants has been evolved by this Court

in decisions construing analogous laws. Application to this case of the rationale which guided this Court's prior determinations should inexorably have produced a result diametrically contrary to the determination made by the lower court.

The majority of this Court in the *Oklahoma* case, which was instituted under the review provisions of the Hatch Act, was based upon an underlying thesis appropriate to the pertinent provisions of the Administrative Procedure Act. It stated:

> "Congress has power to fix conditions for review of administrative orders. By providing for judicial review of the orders * * * Congress [made them] * * * a matter of judicial cognizance. * * * * " [at 137].

This expression is consonant with innumerable decisions of the Court, long acknowledged as the settled law. It has been held that where an administrative order is final,[2] and where the order commands the individual "to do or to refrain from doing anything,"[3] and where legal consequences may flow from the order,[4] the demand for judicial review presents, in the constitutional sense, a "case" or "controversy" between the parties.[5]

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2. *La Crosse Telephone Corp.* v. *Wisconsin Emp. Bd.*, 336 U. S. 18 (1949); *Eccles* v. *Peoples' Bank of Lakewood Village*, 333 U. S. 426 (1948); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).
3. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10 (1927).
4. *Rochester Telephone Corp.* v. *United States*, *supra*, at 132-33.
5. *La Crosse Telephone Corp.* v. *United States*, *supra*; *State of Oklahoma* v. *United States Civil Service Comm'n*, *supra*; *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156 (1939); *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933); *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930); *Old Colony Trust Co.* v. *Comm'r of Int. Rev.*, 279 U. S. 716 (1929); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

The controversy is said to relate to whether or not the administrator may, with legal impunity, require the subject of his order "to do or refrain from doing" those things specified in the order. The adverse parties are considered to be the administrator, insisting on his right, and the subject, resisting the demand as impermissible in law. In *Old Colony Trust Co.* v. *Commissioner of Int. Rev.*, *supra* at 724, the Court held:

> "In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax * * * and the taxpayer is resisting that payment. * * * That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. * * *"[6]

In the instant case, clearly, the "Orders of Supervision" are final, as the lower court itself recognized when it stated that the appellee "has no power to take any further action beyond what he has already done." (R. 163). Each "Order of Supervision" establishes a series of specific things that the appellants must do or refrain from doing. That legal consequences flow from the "Orders of Supervision" is evident under the challenged statute and it is recognized in the statement of the court below to the effect that: "A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment and fine." (R. 164). The appellee asserts his right to promulgate and issue the "Orders of Supervision" and the appellants controvert the existence of such a right.

The court below misplaced its reliance on the *Mitchell* case, in which no specific order had been directed against

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6. *Accord*: *Rochester Telephone Corp.* v. *United States*, *supra*; *Federal Power Commission* v. *Pacific Power & Light Co.*, *supra*; *Federal Radio Commission* v. *General Electric Co.*, *supra*; *Cf. Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894).

the individual complainants. In the instant actions, as in the *Oklahoma* case, the action of the administrator had ripened into a final administrative order, embodying specific directives, against the appellants. Controversy over such an order, in the analogous review proceedings of the *Oklahoma* case, was held to be justiciable by this Court.

That the "Orders of Supervision" are reviewable orders, the legal validity of which are in controversy, in the constitutional sense, between the appellants and the appellee, appears to be beyond doubt under the applicable authorities. The court below reasoned to a contrary conclusion from circumstances which this Court has held not to defeat judicial review.

The court below ruled that no present controversy exists because the "Orders of Supervision" in and of themselves do not inflict penalties for violation, but that the exaction of penalties depends on measures other than the issuance of the orders by the appellee (R. 164). That governmental action over and beyond the issuance of the "Orders of Supervision" is needed to effect sanctions for disobedience, does not detract from the present reviewability of the "Orders of Supervision". In *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 417-18 (1942), the Court held:

> "The regulations are not less reviewable because their promulgation did not operate of their own force to deny or cancel a license. * * * Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. * * * Such regulations have the force of law before their sanctions are invoked as well as after. * * * When * * * they are promulgated by order * * * they are appropriately the subject of attack. * * * "[7]

7. *Accord*: *La Crosse Telephone Corp.* v. *United States, supra; Rochester Telephone Corp.* v. *United States, supra; Powell* v. *United States*, 300 U. S. 276 (1937).

The court below ruled that the controversy cannot exist between the appellants and the appellee because, upon violation of the "Orders of Supervision", it would not be the appellee but "the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted." (R. 164). Yet, in *Rochester Telephone Corp.* v. *United States, supra* at 136, the Court, discussing one of its prior opinions as having "partly yielded to the Government's main contention that the [review] statute applied only where the order [of the Commission] complained of was one which was to be enforced by the Commission," held:

> "More recent decisions of the Court, however, have dispensed with this requisite for review. * * * "

The rationale of this Court would seem to be that although the order is made by the administrator, "not for further proceedings by [himself], it is nonetheless a part of a regulatory scheme. * * * " *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 182 (1938). A court's mandate, under these circumstances, is considered an adequate conclusion of the controversy, for "while penalties may be imposed by the statute for its violation and not for disobedience of the [administrative] order, a favorable order [by the court] would render the prohibitions of the statute inoperative. * * * " *Rochester Telephone Corp.* v. *United States, supra* at 132-33. "Any other construction of [a review statute] would make it necessary for a [person] to take the risk of [acting] illegally and incurring criminal penalties in order to secure a determination [of his rights]." *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 436 (1946). The existence of an order fixing the responsibilities of its subject, is not an abstract declaration by an administrator, but "necessarily and immediately carries direction of obedience." *See*: *Rochester Telephone Corp.* v. *United States, supra* at 143-44. A complainant need neither violate the order,[8] as the court below suggests, or establish with cer-

8. *See*: *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

tainty, as it further insists, that proceedings will be begun to enforce the penalty incurred for non-compliance. *Columbia Broadcasting System* v. *United States, supra* at 418-20. "The purposes sought to be accomplished by [a review statute] would be defeated if a suitor were unable to resort to them to avoid * * * injury resulting from * * * the legal consequences of the [administrative] order * * * *" *Columbia Broadcasting System* v. *United States, supra* at 419.

It is quite clear, therefore, that the decision of the lower court in terms of 5 U. S. C. §1009, is contrary to settled precedent.

The decision of the court below would be in error even were the appellants not relying on the remedy accorded them by the Administrative Procedure Act. Administrative action has long been subject to challenge in ordinary injunction[9] and declaratory judgment[10] actions. The lower court's discomfort concerning the adversary character of the relationship between the appellants and the appellee, seems to stem from the fact that disobedience of the orders of the appellee incurs a penalty not to be effected by him. That this fact should have moved the court below to its conclusion that the parties are not adversaries would seem evidence of an infirmity which Professor Edwin Borchard considers general "in the field of statutes regulating commercial or civil life." He states: "* * * the appendage of a penalty to the regulation ["the least important element of the regulation"] seems to anesthetize the imagination and power of analysis."[11]

The approach of the court below is what has been termed "the unrealistic attitude that a person whose activities are within the purview of the statute can only be affected

9. *Stark* v. *Wickard*, 321 U. S. 288 (1944).
10. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952); *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 (1948).
11. *Borchard, Challenging "Penal" Statutes*, 52 Yale L. J. 445, 475 (1943).

thereby when its sanctions are enforced against him."[12] This Court has rejected the idea that the issuance of the administrative order, separately enforceable, cannot presently injure the party subject to it in light of his present freedom to obey it or not. "They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. * * * *" *Columbia Broadcasting System* v. *United States*, *supra* at 419. The administrator is considered "part of the regulatory scheme,"[13] and a judgment adverse to his action will have effect in that it "will render the [penal] provisions of the statute inoperative."[14] It is clear that even under circumstances where the administrator is not to impose the penalties for violation of his order, he is, nonetheless, an adverse party, and a proper defendant. This Court has accepted him as such both in declaratory judgment[15] and injunction actions.[16]

Certainly violation of the order is no precondition to justiciability in a declaratory judgment action, whose function it is to avoid "any risk of suffering penalty, liability or prosecution." *Public Service Commission* v. *Wycoff Co.*, *supra* at 245-46.[17] Nor is it a prerequisite to injunctive relief.[18] Even were the effect of the injunctive relief to be deemed in the nature of an injunction against criminal prosecution, pre-enforcement relief would here be available.[19] The issuance of the order itself, part of the regula-

12. Note, 25 N. C. L. Rev. 486, 487 (1947).
13. *Shields* v. *Utah Idaho Cent. R. Co.*, *supra*.
14. *Rochester Telephone Corp.* v. *United States*, *supra*.
15. *Connecticut Mutual Life Ins. Co.* v. *Moore*, *supra*.
16. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912).
17. *See also*: *Alvater* v. *Freeman*, 319 U. S. 359 (1943).
18. *Hill* v. *Florida*, 325 U. S. 538 (1945); *Cf. United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940).
19. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Dobbins* v. *Los Angeles*, 195 U. S. 223 (1904); *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207 (1903).

tory scheme, as are the "Orders of Supervision", is sufficient notice of full enforcement of the statutory scheme to constitute the threat requisite to invoke equitable jurisdiction.[20] Particularly where the directives of the order are couched in language so vague as to render even purported compliance a risk, as is the language in the "Orders of Supervision", specific threat of the invocation of the criminal sanctions of the act is not of the essence.[21] The risk involved in violation of the "Orders of Supervision" is not prosecution for a single transaction. The "Orders", in effect, create an entire way of life for the appellants. In a single week, were the appellants to assume to live as though the "Orders" were not extant, the pyramided penalties for violation could jail them for the balance of their lives, and fines imposed could total more than their life-time's expectation of income. Historically, in such circumstances, courts of equity have assumed the power to act to avert such injury.[22]

From the view of declaratory judgment or injunction actions, the lower court's decision would appear to be an anachronism and in conflict with precedent established by this Court.

The controversy between the parties is justiciable, in the Constitutional sense, under any view of the form of procedure pursued by the appellants.

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20. *City Bank* v. *Schnader*, 291 U. S. 24 (1934).

21. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

22. *See e.g.*: *Ex parte Young*, 209 U. S. 123 (1908); *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

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POINT II

Section 1252(d), on its face, deprives appellants of procedural due process in violation of the Fifth Amendment and, as applied, violates Article 1, Section 9 of the United States Constitution.

(a) Section 1252(d), on its face, violates the due process clause of the Fifth Amendment.

In *United States* v. *Spector,* 343 U. S. 169 (1952), the Supreme Court had before it Section 20(c) of the Immigration Act of 1917, as rewritten in Section 23 of the Internal Security Act of 1950 [8 U. S. C. §156(c)], which is presently rewritten as Section 242(e) of the Immigration and Nationality Act of 1952 [8 U. S. C. §1252(e)]. That statute, in the words of Mr. Justice JACKSON, "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements, one, an outstanding order for deportation of an alien, the other, the alien's willful failure to leave the country or take specific steps toward departure." *United States* v. *Spector, supra* at 177.

The majority of the court did not consider the question of whether the statute, on its face, constituted a denial of procedural due process of law, for the reason that:

> "That question was neither raised by the appellee nor briefed nor argued here." [*Id.* at 172].

The Court added:

> "If it had been, we might consider it. [*Ibid*] * * * That question is not foreclosed by this opinion." [*Id.* at 173].

Mr. Justice JACKSON, speaking in dissent with the concurrence of Mr. Justice FRANKFURTER, characterized, as follows, the Court's omission to treat the procedural due process aspects of the statute. He stated:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel." [*Id.* at 180].

Mr. Justice BLACK, dissenting separately on the main issue decided by the majority, on this question, stated nevertheless:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81." [*Id.* at 174, ftn. 2].

Mr. Justice JACKSON, with the concurrence of Justices FRANKFURTER and BLACK, on the issue left open by the majority, considered the statute, on its face, to be unconstitutional, in reliance upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the following reason:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted." [*Id.* at 177].

Section 1252(d) creates a crime analogous to that in the *Spector* case. It consists of two similar elements: one, an outstanding order for deportation of an alien; the other, the alien's willful or knowing failure to comply with regulations of and restrictions upon his conduct imposed by the Attorney General. Read as Mr. Justice JACKSON reads the *Spector* section, Section 1252(d) clearly does "not permit the court which tries [the alien] for this crime to pass on the legality of his presence." Under Section 1252(d)

also, the "the production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence" of his deportability and the "consequent duty" to comply with the regulations of and restrictions upon his conduct. Neither does Section 1252(d) permit "inquiry into the correctness or validity of the order." Under it, too, "a deportation order is made to carry potential criminal consequences," and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court," thus permitting this "vital element" of the crime to be established without a jury trial. *United States* v. *Spector, op. cit. supra* at 177-78.[23]

Mr. Justice JACKSON concluded in the *Spector* case that since the "adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime," the government constitutionally, may not be permitted to "use the result as a conclusive determination of that fact in a criminal proceeding." *Id.* at 178, 179. The statute, in that it enabled such a procedure, he considered to be unconstitutional on its face as a violation of the Fifth Amendment. These same conclusions are impelled in the instant proceedings by the existence, in the section of the statute involved here, of identical constitutionally objectionable elements.

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23. *United States* v. *Heikinnen*, 221 F. 2d 890 (C. A. 7th, 1955), decided after this Court's decision in the *Spector* case, ruled that the constitutional application of the statute requires, if demanded, judicial review by the trial court of the validity of the deportation order upon which the criminal charge rests. Such a construction of the statute, or of its analogue which is here at issue, is inadequate to overcome the constitutional objections interposed by Mr. Justice JACKSON in the *Spector* case. That court's reading of the statute, in fact, is confirmation that the statute makes conclusive on the trial court the administrative determination of the "vital element" of the illegality of the alien's presence, arrived at, without a criminal jury, on less than the full measure of criminal proof.

(b) Section 1252(d), as applied, is a bill of attainder and *ex post facto* law.

As applied to the facts of this case, Section 1252(d), in making the deportation orders against the appellants "carry potential criminal penalties," is a bill of attainder and an *ex post facto* law in violation of Article 1, Section 9 of the United States Constitution.

The orders of deportation against the appellants rest upon the findings of fact and conclusions of law, under 8 U. S. C. §137 [now 8 U. S. C. §1251], that the appellants had been, after entry, members of the Communist Party.

The Act, under which the appellants were found deportable, obviously makes deportable members of an easily identifiable class, namely: "alien members of the Communist Party of the United States." This designation, as well, is one that differed from all prior designations of deportable aliens, which had theretofore been enacted into law by Congress. *See*: *Carlson* v. *Landon,* 342 U. S. 524, 535 (1952).

Thus, the deportation statute, under which the instant deportation orders were procured is, in that it is directed at the members of an easily identifiable class, in the nature of a bill of attainder. *United States* v. *Lovett,* 328 U. S. 303 (1946). And since it relates to past conduct, not theretofore subject to legal sanction, it is in the nature of an *ex post facto law*. *See*: *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952).[24]

In the *Harisiades* case, *supra,* however, it was considered that, in line with prior adjudications, the constitutional objections to the deportation statute as a bill of at-

24. *Galvan* v. *Press,* 347 U. S. 522 (1954) is not to the contrary insofar as the Court approved the constitutionality of the statutory designation of the Communist Party *co nomine* only in terms of its reasonableness as a classification under the Fifth Amendment, and not with regard to the prohibitions of Article 1, Section 9 of the United States Constitution.

tainder and *ex post facto* law could not prevail for the reason that a deportation proceeding was civil and not criminal in nature, and deportation itself, not punishment for a crime. The Court there declared:

> "It has always been considered that that which [is forbidden] is penal legislation. * * * Deportation, however, severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy, supra* at 594.

This was re-emphasized, as has been shown by Mr. Justice JACKSON, in the *Spector* case, in his statement: "Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations." *United States* v. *Spector, supra* at 178.

Section 1252(d), however, as has been shown, adds such "criminal consequences and connotations". It, therefore, supplies the one element, the absence of which has been relied upon to uphold the constitutionality of the deportation statute which created the new category of deportables: "alien members of the Communist Party." Under the circumstances, as applied to these appellants, Section 1252(d) constitutes a bill of attainder and an *ex post facto* law.

POINT III

Section 1252(d), on its face and as applied, deprives appellants of liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

It is well-settled and existing law that aliens, except for liability to deportation and its "incidents", are to be accorded, as a matter of constitutional mandate, all property and civil rights and liberties accorded to citizens. *See, e.g.*

Chew v. *Colding*, 344 U. S. 590, 596, ftn. 5 (1953); *Bridges* v. *Wixon*, 326 U. S. 135 (1945). The political power of the government to expel aliens deemed undesirable, however, cannot be used to deprive them of these liberties and property rights without due process of law. *United States ex rel. Ross* v. *Wallis*, 279 F. 401, 403 (C. C. A. 2d, 1922); *Petition of Brooks*, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, by administrative fiat and without judicial trial, has been permitted only as an "incident" to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation." *Wong Wing* v. *United States, supra; see, Carlson* v. *Landon, supra.*

The Court of Appeals for the Second Circuit recently restated the rule, as extant law. In its decision in *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (C. A. 2d, 1952), the Court said:[25]

> "* * * the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker v. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men * * * such confinement must violate the Fifth Amendment."
>
> "* * * But where * * * confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citi-

25. Reversed as inapplicable to an *excludable* alien as opposed to *deportable* aliens as are the appellants. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953).

zens, aliens, alien enemies or enemy belligerents'. Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

Section 1252(d) fixes the period during which the Attorney General may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for, or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See: *United States ex rel. Mezei* v. *Shaughnessy, supra* at 968; *United States ex rel. Kusman* v. *Shaughnessy,* 117 F. Supp. 541, 544-45 (D. C. S. D. N. Y. 1953); *United States ex rel. Blankenstein* v. *Shaughnessy,* 117 F. Supp. 699, 701, 703 (D. C. S. D. N. Y. 1953).

This provision has been construed to accord with constitutional mandates [*United States ex rel. Mezei* v. *Shaughnessy, op. cit. supra* at 967], and comports with judicial interpretation as to the propriety of the exercise of powers incidental to the right to deport. The courts generally have held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and, therefore, an unlawful restraint. *United States ex rel, Ross* v. *Wallis, supra; Petition of Brooks, supra; Saksagansky* v. *Weedin,* 53 F. 2d 13 (C. C. A. 9th, 1931); *United States ex rel, Dzuro* v. *District Director,* 102 F. Supp. 704 (D. C. S. D. N. Y. 1951).

Subsection (d) of Section 1252, however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to deport has become—either temporarily or permanently—inviable, by reason of the inability to effect deportation. The Attorney General is authorized and directed to supervise and impose conditions and restrictions upon the life, liberty and property of those aliens whose removal from the United States has

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been ordered, but cannot or may not be effected, for an unlimited time after, by statute—the same statute—the power to detain to make "arrangements" for deportation, has ended.

These powers transcend the political power of the government to deport and to restrain or regulate as an "incident" to deportation. Since the conditions and restrictions which Section 1252(d) prescribes be placed upon an alien's liberty and property may, under the terms of Section 1252(d), be imposed without resort to "those indicia of legal procedure that are embedded in the constitution as the right of all men," they constitute an illegal and unconstitutional deprivation of the alien's liberty and property. The statute, in that it authorizes such deprivations, violates, on its face, the due process provision of the Fifth Amendment.

In *Wong Wing* v. *United States, supra,* this Court clearly determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and, constituted a violation of the Fifth Amendment. The Court struck down the "Geary Act" [Section 4, Act of May 5, 1892] as a transgression of the Fifth Amendment, for authorizing a year's imprisonment for Chinese aliens found, without judicial trials, to be in this country unlawfully. It held that Congress cannot "promote its policy in respect to Chinese persons by adding to its provisions for their expulsion and exclusion punishment by imprisonment at hard labour", inflicted without judicial trial. *Id.* at 235.

The rationale of the Court relating to the Geary Act is clearly applicable to Section 1252(d), which is its analogue. The Geary Act, in the view of the Court, without judicial trial, deprived Chinese aliens of liberty by authorizing their imprisonment for a year. Section 1252(d) similarly seeks, without judicial trial, to deprive aliens of liberty and property by subjecting them to supervision which

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does and may further circumscribe their movements, restrict and impair their normal living and their right to work for an unlimited period of time—conceivably as long as they may live or until their departure from the United States can be effected. "Liberty" is not restricted in its import to freedom from imprisonment. This Court, in its recent decision, *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) ruled:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * *"

See also: *Williams* v. *Fears*, 179 U. S. 270, 274 (1900); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897); *Bauer* v. *Acheson*, 106 F. Supp. 445, 450 (D. C. D. C. 1952).

That the power to deport does not, as well, include the right, without judicial trial, to restrict and impair freedom, liberty and property rights of aliens, although short of actual imprisonment, was sharply enunciated by Circuit Judge ANDERSON in *Petition of Brooks, supra.* The order of deportation against the alien in that case, concededly, could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge ANDERSON rejected this contention as unlawful and pointed out:

> "He is entitled to be deported or to have his freedom * * * any further detention by the Immigration authorities *or control of* [*the alien's*] *freedom is illegal.*" [at 235, 240] (Emphasis added.)

The conditions circumscribing and restricting the lives and livelihoods of the instant appellants, authorized by the statute and imposed by the appellee, are such a "control of [their] freedom" as to render illegal both the statute, the regulation and the "Orders of Supervision" requiring the appellants to conform to the conditions.

Subjection to "supervision" is itself a "control of freedom" of far greater consequence than the control by bond in *Petition of Brooks, supra.* The statute here, moreover, requires and the "Orders of Supervision" direct the appellants to report to an officer of the Immigration and Naturalization Service, a restriction of freedom disapproved in *Petition of Brooks, supra.* The requirement that the appellants appear for medical or psychiatric examination is clearly of the same nature. The requirements of some of the appellants that they remain within a 50 mile radius of Times Square and remain residents of the Third Immigration District, unless with express permission of the appellee to be granted or withheld in his unrestricted discretion, are clearly deprivations of their liberty. In *Williams* v. *Fears, supra,* this Court declared:

> "Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the constitution." [at 274]

Accord: *Bauer* v. *Acheson, supra; Walker* v. *Chief Quarantine Officer,* 69 F. Supp. 980, 983 (D. C. D. Canal Zone Div. 1943).

The appellants are required to relinquish membership in the Communist Party—not in itself illegal; cease all support of, and all activities on behalf of all policies and doctrines of the Communist Party and its "affiliates"—whether legal or not; end their association with all members of the Communist Party or its affiliates, whether political in character, social or business, innocent or otherwise; to supply any and all information regardless of constitutional or common law privilege. The right to be free of such restrictions is a right accorded to aliens, and is undeniable, even after "judicial trial," as an infringement of First Amendment rights.

The "supervision" authorized by the statute is of such a latitude that it may be employed to—and in fact has—

affect or deprive the appellants of their jobs and livelihoods, a property right which is theirs under the Constitution. *See*: *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 (1948) and cases cited therein.

The deprivation of the rights and liberties authorized by Section 1252(d) and accomplished here by the "Orders of Supervision", under circumstances where the exercise of the power to deprive no longer rests on the power to deport or powers incidental thereto, violates the Fifth Amendment, since the restrictions on liberty and property are imposed without due process of law, but by administrative fiat.

In *Carlson* v. *Landon, supra,* the approval of the exercise of discretion to detain, based on the statutory criterion that detention would serve to eliminate an arrested alien's "opportunity to hurt the United States," hinged on the incidental power to detain *pending determination of deportability,* an area within the plenary power of Congress to expel, apparently, under the *Carlson* case, without let or hindrance from the Fifth Amendment. The rationale of the *Carlson* case is inapplicable here. In the instant cases, the deportation proceedings are completely at an end, and deportation has become "patently impossible" for an unforeseeable period of time. The Congress may not "promote its policy" to protect the United States from the alleged activities which allegedly render an alien undesirable, "by adding to its provision for their expulsion and exclusion" deprivations of life, liberty and property without judicial trial. *Wong Wing* v. *United States, supra.* There exist still in the nation, for its protection, investigative agencies, criminal statutes, and "the speedy indictment and trial of actual crime in the courts." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 969. No other mode may be adopted consonant with constitutional due process.

POINT IV

Section 1252(d), on its face and as applied, inflicts punishment upon the appellants in violation of the Fifth Amendment to the United States Constitution.

In *Cummings* v. *Missouri*, 71 U. S. 277, 320 (1866), this Court established the proposition that:

> "The deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact. * * *"

The statute in question here permits the deprivation of, and the "Orders of Supervision" made against the appellants, deprive them of liberty, and rights—civil, political and property. *See*: Point III, *supra*. In the circumstances under which these seemingly civil disabilities are authorized and were applied here, they constitute punishment. *See also*: *Ex parte Garland*, 71 U. S. 333 (1866); *Pierce* v. *Carskadon*, 83 U. S. 234 (1872); *Burgess* v. *Salmon*, 97 U. S. 381 (1878); *Harisiades* v. *Shaughnessy*, *supra*. The single "circumstance" that will render a civil disability a penalty or a punishment, is the absence of a reasonable relation to the power which the civil disability is intended to aid. *Cummings* v. *Missouri*, *supra* at 319-20.

Congress has, concededly, the plenary power to deport aliens it deems undesirable. As an incident to this power, it may authorize the control or the restriction of an alien's liberty pending deportation and while arrangements are being made for the actual deportation, on criteria which it deems fit, including its evaluation of the effect of the alien's freedom upon the welfare of the nation. [*See*: *Carlson* v. *Landon*, *supra*.] The power to employ such a criterion, as a basis for detention or control, ends when the power to detain or control ends: with the termination of the proceeding to deport and at that time when "deporta-

tion becomes patently impossible." *United States ex rel. Mezei* v. *Shaughnessy, supra* at 967; *Wong Wing* v. *United States, supra.*

The power to "supervise" granted by Section 1252(d) and the "supervisory" power exercised over these appellants, have no reasonable relation to the exercise of any of the powers which Congress may exercise or authorize over deportation and the deportable alien. It is possible to see, from an analysis of the "Orders of Supervision" this lack of relation, which displays, as the oath in the *Cummings* case, *supra,* the punitive purport of the "Orders":

> "It was required to reach the person, not the calling. It was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." [at 320]

That the statute was not intended to be directed at control of the alien pending the conclusion of deportation proceedings, is patent from the fact that Section 1252(d) does not become applicable until six months after the final conclusion of a deportation proceeding. It is likewise clear that it is not a temporary control while arrangements are being made for deportation, for it is precisely the impossibility of effecting deportation within the prior six months that juvenates the power to supervise under Section 1252(d). And it comes into effect after that period during which the determination as to whether to control or not to control the liberty of the alien may be made on the basis of an evaluation that it is necessary for the welfare of the nation. *See*: *Carlson* v. *Landon, supra.*

Nor can it be said that the statute or the "Orders of Supervision" are related to a power, perhaps inherent in the power to deport: to insure the capacity to deport and

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to avoid the frustration of that power. The disabilities imposed by the "Orders of Supervision" which most clearly indicate the punitive character of all of the disabilities, even those innocent on their face, appear in paragraphs 6 and 7 of the "Orders". [In some instances, the paragraph numbers are 5-a and 5-b.]

Paragraph 6 commands the appellants to terminate their membership in the Communist Party and its "affiliates" and their support and activity in behalf of the doctrines and policies of both. Paragraph 7 requires that the appellants refrain from any or any type of association with members of the Communist Party and its "affiliates" or persons who support the doctrines or policies of either.

It is clear that mere membership in the Communist Party is not a crime. *See*: *Rogers* v. *United States*, 340 U. S. 367, 732, ftn. 12 (1951); 50 U. S. C. §783(f). It must, therefore, necessarily be so that other or different "associations" between Communists may be equally innocent. Paragraphs 6 and 7 of the "Orders of Supervision" deprive the appellants of their rights to these legal associations, to income which accrues to some of them as a result of these legal associations, and punishes a breach of the inhibitions against those associations by criminal penalties. Of these paragraphs, propounded under the aegis of Section 1252(d), it may be truly said, as in the *Cummings* case: "* * * it was thought that the several acts deserved punishment, and * * * there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

The remaining paragraphs of the "Orders" establish, as a substitute for the jail to which these appellants may not be sent, a system of police surveillance over their lives that differs only in degree, but not in kind, from imprisonment, and is, in fact, in the nature of a house arrest. They are limited in their travel area and their unrestricted choice of residence. They must report in person. Subsection (3) of the statute and paragraph 2 of the "Orders", providing

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for physical and mental examination and sweeping unlimited interrogatories, subject the appellants, as Justice BLACK, for the majority, stated in *Hines* v. *Davidowitz*, 312 U. S. 52, 71 (1941): "to a system of indiscriminate questioning similar to the espionage systems existing in other lands." An innocent purpose is not to be attributed to these regulations. They are not needed here to insure the deportation of these appellants. The "Orders" require that the appellants appear for deportation, when it can be effected [Paragraph (1)]. Their whereabouts are constantly known to the government by virtue of their alien registration, pursuant to 8 U. S. C. §1302, and changes in their residence must also be made known, and have been. These appellants, heretofore, have met their legal obligations to appear at all times when they might have been legally summoned.

Section 1252(d) authorizes, and the "Orders" herein provide a substitute for prison and penalties. They are punishment. Inflicted without due process of law, and solely by administrative fiat, they are in violation of the Fifth Amendment.

POINT V

Section 1252(d) deprives appellants of the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

It has been well-settled law since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantee of equal protection of the laws extends not only to citizens, but to aliens as well. In the recent case of *Takahashi* v. *Fish Comm'n*, *supra*, this Court expressed the extant law to be:

> "The Fourteenth Amendment and the laws adopted under its authority * * * embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." [at 420]

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It has been held that the due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations—concepts which are the core of the equal protection clause. See *Detroit Bank* v. *United States*, 317 U. S. 329 (1943); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Carleton Screw Products Co.* v. *Fleming*, 126 F. 2d 537 (C. C. A. 8th, 1942), *cert. den.* 317 U. S. 634; *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. 2d 1006 (Em. Ct. App., 1945), *cert. den.* 324 U. S. 865.

A fortiori, the Fifth Amendment, just as the Fourteenth, constitutes a protection for the alien from statutes which impose upon him, *by reason of alienage alone*, certain burdens. *Wong Wing* v. *United States, supra.* Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States, renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what non-citizens shall be permitted to remain within our borders." *Carlson* v. *Landon, supra* at 534. The power to detain, or, instead, to impose regulations on conduct to insure the deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon, supra* at 538. Where, as has already been demonstrated, the power to deport ceases or is rendered ineffectual, constitutional authority to exercise the powers over the alien, incidental to deportation, ceases. By the terms of Section 1252, the authority to detain, or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation. The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is resident in the United States, until such time as he can be deported, and a beneficiary of the rights guaranteed by the Constitution to all people within our borders.

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Section 1252(d) seeks to impose upon the alien whose deportation cannot be effectuated within the six months period, a series of requirements and restrictions, unrelated to the deportation or effectuation of the deportation of the alien. The controls sought to be imposed by Section 1252(d) relate rather to control of the conduct deemed "undesirable." The regulations of conduct, activity or association authorized by the statute on its face and, more specifically as applied here, neither this law, nor any other, prescribes for a citizen.

There is little question that the character of conduct, activity and association included in the 17 categories of aliens legislatively declared undesirable [8 U. S. C. §1251] would be and is considered equally undesirable on the part of citizens. This is evidenced by the fact, certainly as to the conduct which it has been found rendered the appellants deportable, of the existence of penal statutes proscribing such conduct. *See*: *e.g.* 18 U. S. C. §2385; 50 U. S. C. §783.

The conduct, activity, or association rendering aliens "undesirable" and deportable, therefore, cannot reasonably set such aliens apart from citizens engaged in the same allegedly "undesirable" conduct, activity, or association, in terms of the control of such activities. No more harm results to the nation from one than the other. *See*: *Wong Wing* v. *United States*, *supra*. Both are subject to the same penal sanctions designed to safeguard the society and the nation. In *United States ex rel. Mezei* v. *Shaughnessy*, *supra*, the Court of Appeals for the Second Circuit stated:

> "* * * we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; the speedy indictment and trial of actual crime in the courts still obtain." [at 969]

The added burdens imposed by Section 1252(d), on its face and as applied here, upon aliens, is, patently, by reason

of alienage alone. Clearly then, the statute which authorizes the imposition of these regulations, the rules promulgated thereunder, and the "Orders of Supervision" issued in alleged pursuance thereof, deprive the appellants of the equal protection of the laws in violation of the Fifth Amendment.

POINT VI

Section 1252(d) unlawfully delegates legislative power to the Attorney General and his application thereof is a usurpation of legislative power in violation of Article 1, Section 1 of the United States Constitution.

(a) Section 1252(d) is an unlawful delegation of power.

Section 1252(d) commends "any alien" against whom a final administrative order of deportation has been outstanding for more than six months, to the supervision of the Attorney General under regulations prescribed by him.

For such a delegation of power to be constitutionally valid under Article 1, Section 1 of the Constitution, the statute must declare a guiding "policy", or establish a "rule", or an "intelligible principle", or such policy, rule or principle must be found in the "purpose of the act, its factual background and the statutory context in which they appear." *United States ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 (1950); *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *American Power & Light Co.* v. *Securities & Exch. Comm'n*, 329 U. S. 90, 104-5 (1946); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935).

The section itself establishes no policy or rule or principle to limit or guide the Attorney General in framing regulations which constitute his supervision of aliens. Although subsections (1), (2) and (3) of Section 1252(d) appear to direct, specifically, the character of certain supervisory

regulations, subsection (4), which requires an alien "to conform to such reasonable written restriction on his conduct and activity as are prescribed by the Attorney General," invests the Attorney General with an unlimited and undefined power, not only to regulate beyond the specific prescription of subsections (1), (2), and (3), but as to any other matter he may choose.

While it has been said that the Congressional purpose in deportation laws, at least as to alleged Communist aliens, in terms of securing their expulsion and protecting American society from such activity on their part pending deportation, provides an adequate statutory guide [*See*: *Carlson* v. *Landon*, *supra* at 543-4], it is clear from the terms and provisions of Section 1252(d) that this standard is obviously not intended to be the guide to the administrative discretion to be exercised under Section 1252(d).

Subsection (3), for instance, requires an alien to submit to interrogation, not only as to his "nationality, circumstances, habits, associations, and activities," but, as well, concerning "such other information, *whether or not related to the foregoing.*" (Emphasis added.) The delegation of power to demand information, thus unrelated, grants to the Attorney General a roving commission. No corner of an alien's mind, no idea, no belief, no thought, is free from administrative scrutiny. No business activity, political activity, or personal activity is free of the power to interrogate. No association, no matter how innocent, licit, or personal, is protected by the right to privacy.

It is difficult to understand, on the face of it, the relationship between the requirement that *any and every* deportable alien be required to subject himself, under subsection (2), to medical and psychiatric examination, and the eventual effectuation of his deportation or the protection of the community pending it. As to mental defectives or prostitutes, perhaps a relationship exists. But why as to Communists? And how frequent an examination is needed to protect the community? Once a week?

Every day? Twice a day? Must the alien be ill? Or may he be subjected to examination even if well? There is no guide provided in the statute to direct the Attorney General, or to prevent him from converting this subsection into an instrument of harassment or oppression.

In the instant case, under subsection (1), the appellants are required to appear personally, a condition, which, as to some creates a severe physical hardship, and as to all a serious interference with lawful, gainful occupations. Yet, under the terms of the subsection, the Attorney General may require daily reporting, which would render it impossible to retain any job. For the statute sets no standard for how much "identification" is necessary to insure the alien's deportation or to "protect" the community until the alien may be deported.

Subsection (4) is a *carte blanche*. The Attorney General, under it, may, without restriction, control the alien's life. Here, many of the "Orders of Supervision" limit travel to a 50 mile radius from Times Square. Under the statute, the Attorney General is as free to make it 10 miles, or to confine the alien to his own home and yard. Is the Communist less of a "menace" in the Times Square area than on the eastern shore of Maryland or on the Connecticut Sound? Or perhaps is there greater safety in some American-created Siberia?

Here some of the appellants are required to discontinue their membership in the Communist Party, although to do that, would mean the loss of their lawful jobs, their only source of income. If this may be accomplished thus indirectly, has the Attorney General not the power to order that they resign other lawful jobs or forfeit other financial benefits? And has he not as well the power to order them to resign from the American Legion, the Catholic Church, the National Association for the Advancement of Colored People? He has ordered the appellants to cease their associations with other Communists, although some of them

must continue such associations to maintain lawful occupations or would desire to continue such associations to extend lawful social relations, many of long standing. If this may be accomplished thus indirectly, is the appellee not free to order them to stop association with all other Americans, on the "germ" theory of the spread of Communism and thus place the appellants in virtual solitary confinement within their 50 mile circle?

By virtue of the delegation granted by Section 1252(d), to control the lives of and restrict the liberty of aliens—violation constituting a felony bearing criminal penalty—the Attorney General has been given a free hand. In fact, by virtue of the criminal penalty, he has been given power to legislate a series of crimes, for conduct or activity, which is not otherwise, and, in some instances, could not be made criminal.

The "Orders of Supervision" here were made in alleged pursuance of such an unlawful delegation of power. The "Orders" and the statute must, therefore, be declared invalid and void and in violation of Article 1, Section 1 of the United States Constitution.

(b) The supervisory conditions imposed here are a usurpation of a legislative power.

It is well settled that: "Implied authority in an executive officer or department to repeal, extend, or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter*, 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Products Corp.*, 315 U. S. 475, 489 (1942).

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(1) *As to Paragraphs 6 and 7 of the "Orders of Supervision"*

Section 4(f) of the Internal Security Act of 1950 [50 U. S. C. §783(f)] provides:

> "Neither the holding of office nor membership in any Communist organization shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

Yet paragraphs 6 and 7 of the "Orders of Supervision" [in some instances 5-a and 5-b] proscribe membership in the Communist Party and its "affiliates". Violations of the proscriptions of paragraphs 6 and 7 become subject to the criminal penalties provided by Section 1252(d). The action of the appellee, therefore, in incorporating paragraphs 6 and 7 in the "Orders" "has the effect to subject * * * persons to fines and penalties under the act, that are excluded therefrom, by the terms of" the Internal Security Act of 1950.

Clearly this assumption of power by the administrative officer, contrary to the express policy and provision of Congress, is a usurpation of Congress' legislative function, in violation of Article 1, Section 1 of the Constitution.

(2) *As to paragraph 8 of the "Orders of Supervision"*

Paragraph 8 of the "Orders of Supervision" [in some instances 5-c] direct that the alien:

> "* * * shall not violate sec. 2385 of the 'Smith' Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Sec. 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50 of the U. S. Code)."

Section 2385 of the "Smith" Act provides that as the penalty for its violation, the convict:

> "Shall be fined not more than $10,000 or imprisonment not more than ten years, or both, * * *."

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The penalty section of Section 4 of the Internal Security Act provides:

> "Any person who violates any provision of this section, shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both * * *."

It was the design of Congress that *these* should be the penalties for violating either law. The inclusion of a further prohibition against their violation in the "Orders of Supervision"—an obvious redundancy in light of the existence of the statutes—has the effect, only, of increasing the penalties for their violation by applying to such violation the additional criminal penalties of Section 1252(d): namely, an additional year's imprisonment and fine of an additional $1,000.

Of such administrative action, this Court said in *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404 (1944):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Wallace* v. *Cutten, supra*, [298 U. S. 229]."

Paragraph 8 is, therefore, manifestly a violation of Article 1, Section 1 of the United States Constitution.

POINT VII

Section 1252(d) is vague and indefinite in violation of the Fifth Amendment to the Constitution of the United States.

A statute which, on its face and as applied, is so vague and indefinite, as to permit within its scope its administrators and enforcers, to burden, prohibit or make criminal, conduct and belief which are constitutionally permissible and protected, violates the Fifth Amendment and, as well, the constitutional provision protective of the exercise of such conduct or the holding of such belief. *Winters* v. *New York*, 333 U. S. 507 (1948); *Herndon* v. *Lowery*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

(a) As to Subsection (4).

Subsection (4) of Section 1252(d), in according to the Attorney General an undefined latitude to impose "written restrictions on [the alien's] conduct and activity," and in making criminal their violation, is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York, supra* at 509. An alien, whether deportable or not, while in residence here is entitled to the guarantees of freedom of speech, press and association protected by the First Amendment. *Bridges* v. *Wixon, supra; see*: *Chew* v. *Colding, supra.*

The statute, as applied in the instant case by the "Orders of Supervision," does in fact create restrictions upon the conduct of the appellants which deprive them of First Amendment rights. The "Orders of Supervision" command each of the appellants, with minor deviations in some instances, to:

> "* * * terminate, and remain disassociated from, membership in, if any, support or other activity, if any,

in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate or subdivision of any such group or organization."

"* * * refrain from associating with any person, knowing or having reasonable ground to believe that such a person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in [the above] Paragraph."

The mere statement of these blanket prohibitions is adequate to demonstrate that they are the type of ban that is prohibited by the First Amendment's guarantees of freedom of speech, press and assembly. *American Communications Association* v. *Douds, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945); *Near* v. *Minnesota,* 283 U. S. 697 (1931).

Furthermore, the language of the prohibitions referred to above is so vague and indefinite as to make it impossible for the appellants to ascertain what it is they must or may not do, under criminal penalty, in violation of their rights under the Fifth Amendment. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const. Co.,* 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921).

What is to be deemed "support" of doctrines and policies of the Communist Party? What is meant by "activity" in furtherance of "doctrines" or "policies" of the Communist Party? What is meant by "doctrines" or "policies" of the Communist Party? What is to be deemed an "affiliate" of the Communist Party? There is no legislative or judicial finding as to which organizations are

"affiliates" of the Communist Party, or of the Communist Parties of the various states, or political or geographical subdivisions of the states, or of the various foreign countries. *See*: *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). With whom shall the appellants refrain from associating? What is meant by "associating" under this paragraph? What is "reasonable ground to believe" that a person is a Communist? Each of the appellants has alleged that his reading of the order reveals that its language could support a variety of interpretations and that he is at a loss to know by just which among them his conduct is to be governed (R. 22-23, 29-31, 36-38, 44-45, 49-52, 59-61, 67-69, 74-76, 81-83, 89-90, 93-96, 102-06, 111-15, 119-23).

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the appellants must make such determinations at the risk of criminal indictment. As this Court recently said in *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

By virtue of the undefined latitude of subsection (4) of Section 1252(d), the Attorney General, in the "Orders of Supervision" deprives the appellants of the liberty—without due process of law—to travel beyond a radius of 50 miles from Times Square. Such restrictions on freedom of movement have been held to be deprivations of liberty in violation of the Fifth Amendment. See: *Williams* v. *Fears*, *supra*; *Allgeyer* v. *Louisiana*, *supra*; *Bauer* v. *Acheson*, *supra*.

Similarly, the indefiniteness of subsection (4) has enabled the appellee to impose the condition, contained in

paragraph 3-b of the "Orders of Supervision", that the appellants may not change their places of residence without the express permission of the Immigration Service, to be granted or withheld in its apparently unrestricted discretion. Not only does this condition constitute the same type of deprivation of liberty as the 50-mile travel restriction, but it has been and may, as well, be applied to frustrate a removal of residence designed by the appellants in aid of their employment, or to secure or better their livelihoods—property rights which accrue to them under the constitution. *See*: *Takahashi* v. *Fish Comm'n, supra.*

(b) As to Subsection (3).

Subsection (3) of Section 1252(d) authorizes the Attorney General to, and by paragraph 2 of the "Orders of Supervision" he requires the alien to "give information under oath as to his nationality, circumstances, habits, associations, and activities, whether or not related to the foregoing as the Attorney General may deem fit and proper." No unlimited power to interrogate resides in any branch of the government. *See*: *e.g., McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Rumely* v. *United States*, 345 U. S. 41 (1953). Unless it is an aid to the proper exercise of some power which the government may constitutionally have, the usurpation of a right to examine may violate one or more of the constitutionally protected rights of the subject of the interrogation. Subsection (3) of Section 1252(d), on its face, is a license to the Attorney General to exercise the power granted by it "whether or not related" to the subject—or the constitutional authority on which it rests—of the statute. This statutory mandate, so broad as to permit its exercise in areas protected by the First and Fourth Amendments of the United States Constitution, is void in violation of those Amendments and the Fifth Amendment. *Cf. Winters* v. *New York, supra.*

(c) As to Subsections (1) and (2).

Subsections (1) and (2) of Section 1252(d), requiring appearance for identification "from time to time" and for medical and psychiatric examination "when necessary" are so indefinite in their direction, as to permit the Attorney General to convert those requirements into means of depriving an alien of his liberty or property.

"From time to time," or "when necessary" is not a limitation, but an absence of limitation. The Attorney General is free to compel an alien to appear daily or twice or three times a day, making such appearances a virtual substitute for physical detention. This reporting may become so frequent as to make the strain of it a serious threat to the alien's health, or so time-consuming as to make it impossible for an alien to retain a job to support himself or his family. In the instant cases, it seriously affects both aspects of the appellants' lives (R. 19-20, 26-28, 34-35, 41-42, 52-53, 57-58, 64-65, 71-73, 78-80, 96, 101, 109-10).

Such an undefined grant of power cannot be squared with the Fifth Amendment.

POINT VIII

The "Orders of Supervision" herein impose regulations of and restrictions upon the conduct and activities of the appellants which are unreasonable and an abuse of power.

Section 1252(d) requires that the restrictions imposed by the Attorney General on the conduct or activity of the alien be "reasonable". Each of the appellants, in his complaint and affidavit in support of his motion for temporary relief, has set forth facts to establish that, as to each of them, the regulations of and restrictions upon his con-

duct are unreasonable and an abuse of power (R. 17, 24, 32, 39, 47, 55, 62, 70, 77, 84, 91, 98, 107, 115). It is submitted that, even assuming *arguendo* the constitutional validity of Section 1252(d) and the provisions of the "Orders of Supervision," the "Orders," being unreasonable, are illegal and should not be enforced.

CONCLUSION

Plenary consideration of this appeal should be afforded to the appellants, the decision of the court below reversed, and the relief requested by the appellants granted.

Respectfully submitted,

BLANCH FREEDMAN AND GLORIA AGRIN,
Attorneys for Plaintiffs-Appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 29

MICHAEL NUKK, FRANK BORICH, JOSEPH SIMINOFF, FELIX KUSMAN, ROSE LIGHTCAP, IDA GOTTESMAN, ANNA TAFFLER, BENNY SALTZMAN, BESSIE GEISER, MARTIN YOUNG, BORIS SKLAR, APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK

BETTY GANNETT, ALEXANDER BITTLEMAN, CLAUDIA JONES, APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the specially convened three-judge District Court (R. 157–165) is reported at 125 F. Supp. 498.

JURISDICTION

The fourteen appellants began fourteen substantially similar actions in which they sought, *inter alia,* to enjoin on constitutional grounds the enforcement and operation of Section 242 (d) of the Immigration and Nationality Act of 1952, *infra,* pp. 4–5. On June 21, 1954, an order was entered convening a statutory three-judge District Court to hear the fourteen cases (R. 145–146).

On October 11, 1954, the statutory court filed a single opinion and order dismissing all fourteen complaints, on the ground that there was no justiciable controversy (R. 157–165). On December 1, 1954, a single judgment was entered thereon (R. 166–168). On December 7, 1954, appellants filed their notice of appeal (R. 169–178). This court noted probable jurisdiction on January 31, 1955 (R. 183). The jurisdiction of this Court to review on direct appeal the order and judgment of the District Court is invoked under 28 U. S. C. 1253 and 2101.

QUESTIONS PRESENTED

1. Whether appellants have alleged a case or controversy appropriate for judicial determination.

2. If it is assumed that a justiciable case or controversy is presented, whether the judgment below should be affirmed on the ground that the statute subjecting aliens, against whom a final order of deportation has been issued, to supervision pending eventual deportation, is constitutional on its face and has been properly applied.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. PROVISIONS RELATING TO JUSTICIABILITY

As regards the threshold problem of justiciability, the relevant Constitutional and statutory provisions are: Article III, Section 2, of the Constitution; the Federal declaratory judgment statute, 28 U. S. C. 2201, which permits an action for a declaratory judgment in cases of "actual controversy"; and Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009. These provisions are set forth, in pertinent part, in Appendix A, *infra,* at pp. 70–72.

B. PROVISIONS RELATING TO THE MERITS

1. *The Constitution:* Appellants invoke the Constitutional provisions set forth below:

Article I, Section 1, insofar as relied upon, provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, * * *.

Article I, Section 9, insofar as relied upon, provides:

> No Bill of Attainder or ex post facto Law shall be passed.

The First Amendment, insofar as relied upon, provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, * * *.

The Fourth Amendment, insofar as relied upon, provides:

> The right of the people to be secure in their persons, * * * against unreasonable searches and seizures, shall not be violated, * * *.

The Fifth Amendment, insofar as relied upon, provides:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

2. *The Statute:* Section 242 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 208, 211, as amended September 3, 1954, 68 Stat. 1232,[1] 8 U. S. C. (1952 ed. Supp. II) 1252

[1] This amendment deleted the words "shall upon conviction be guilty of a felony, and" from the list of sanctions set forth in the final sentence.

(d), provides:

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

3. *The Regulations:* As amended July 20, 1954, 8 C. F. R. (1955 Supp.) 242.3 (c), promulgated pursuant to Section 242 (d), *supra,* provides:

> *Release; supervision after six months' period has expired: warning of penal provisions.*
>
> An alien against whom an order of deportation has been outstanding for more than six months shall, pending deportation, be placed under supervision by the district director, deputy district director, or officer in charge having administrative jurisdiction over the office in which the detention or release of such alien was authorized. An alien placed under supervision pursuant to this paragraph shall be advised of the penal provisions of section 242 (d) of the Immigration and Nationality Act. Aliens placed under such supervision shall, among other things, be required to:
>
> (1) Appear from time to time at specified times or intervals before an officer of the Service for identification;
>
> (2) Submit, if necessary, to medical and psychiatric examination at government expense;
>
> (3) Give information under oath as to his nationality, circumstances, habits, associations and activities, and other information whether or not related to the foregoing as may be deemed fit and proper; and

(4) Conform to such reasonable written restrictions on his conduct or activities as may be prescribed.

STATEMENT

All fourteen appellants are aliens who have been ordered deported because of membership in the Communist Party (R. 18, 25, 33, 40, 48, 56, 63, 71, 78, 85, 92, 99, 108, 116). Each appellant brought a substantially similar action in the United States District Court for the Southern District of New York against appellee Shaughnessy, the District Director of Immigration (R. 1–15).[2] In these fourteen actions appellants seek declaratory judgments and injunctive relief, alleging that Section 242 (d) of the Immigration and Nationality Act of 1952, *supra,* pp. 4–5, the regulations thereunder, *supra,* pp. 6–7, and certain orders of supervision issued pursuant thereto, are unconstitutional and invalid (R. 5–10). A specially convened three-judge District Court (R. 145–149) entered an order (R. 165) and a judgment (R. 166–168) dismissing all fourteen complaints, on the ground that no justiciable controversy had been alleged (R. 163–165).

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[2] The printed record contains only one of the fourteen complaints, that filed by appellant Nukk. By agreement, the remaining thirteen complaints, all of which are substantially similar to that filed by appellant Nukk, were not printed. They are, however, part of the certified record on file with this Court (see R. i–ii).

1. *The facts* pertinent to the issues raised on this direct appeal may be summarized as follows:

In each of these fourteen cases more than six months elapsed, after the entry of the final order of deportation, without deportation having been effected, thus rendering each appellant subject to the supervision requirements of Section 242 (d), *supra,* pp. 4–5. In three of the cases, those of appellants Gannett, Bittleman, and Jones, the deportation orders were not executed because these appellants had not yet begun to serve prison sentences imposed following convictions under the Smith Act.[3] In the remaining eleven, deportation could not be effected because no country was found which would admit these aliens.

Section 242 (d) provides that all such aliens, pending eventual deportation, shall "be subject to supervision under regulations prescribed by the Attorney General". It also provides that these regulations shall "require any alien subject to supervision (1) to appear from time to time before

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[3] Under Section 242 (h) of the Act, 66 Stat. 212, 8 U. S. C. 1252 (h), an alien sentenced to imprisonment cannot be deported until his sentence has been served. When their actions were begun, appellants Gannett, Bittleman and Jones were free on bail awaiting the outcome of their Smith Act conviction appeal. As they have been in prison since the denial of their petition for certiorari in *Flynn* v. *United States*, 348 U. S. 909 and 956, they are no longer subject to the orders of supervision whose validity they are here challenging. Thus as to them, the instant cause appears to be moot.

an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case". The prescribed regulations are found in 8 C. F. R. 242.3 (c), *supra,* pp. 6–7, and closely follow the statutory language.

Pursuant to this statute and to the regulations issued thereunder, each appellant was served with an "order of supervision" (R. 18, 25, 33, 40, 48, 56, 63, 71, 78, 85, 92, 100, 108, 117), notifying him that, pending his deportation, he was being permitted to remain at large, but subject to supervision on certain stated terms. These fourteen orders are all substantially similar, although they differ slightly in certain unimportant respects (see R. 162).[4]

[4] Owing to the close similarity of each of the fourteen orders of supervision, only that served upon appellant Nukk has been included in the printed record (R. 12–15). In each action, a copy of the pertinent supervision order was annexed as "Exhibit A" to the complaint, and thus appears in the certified record on appeal. Cf., fn. 2, *supra*, p. 7.

The orders (*e. g.*, R. 12–15), with minor variations, require each alien to report either in person or in writing at stated intervals [5] to the officer in charge of the Immigration and Naturalization Service in the district; to notify the officer in charge of any change in residence or employment within the district within 48 hours after the change; to apply for permission to change the place of residence from one immigration district to another; and to report, when requested, for medical and psychiatric examination and to "furnish such information as may be deemed fit and proper" (R. 13).

In addition, each alien is required to disassociate himself from activities in furtherance of Communist Party doctrines and policies, and to refrain from knowingly associating with any person who is a member of or affiliated with the Communist Party.[6] The prohibition against as-

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[5] Originally most of the appellants were required to report weekly, but this provision was subsequently administratively modified to require reporting but once each month (see Appendix B, *infra*, p. 74).

[6] In forbidding further Communist Party activities and associations, the supervision order set forth in the printed record provides (R. 13–14):

> (5) (a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any

sociating is expressly stated not to apply to members of the alien's family or to professional legal counsel, provided the associations are not used in the furtherance of the proscribed activities (R. 13–14). In the cases of the three appellants who have been convicted of violating the Smith Act and in about half of the remaining cases, the alien was directed not to travel more than 50 miles from Times Square, New York, without prior written permission. As regards the minor variations in the respective orders, the court below noted that the "orders of supervision vary in certain unimportant respects, *e. g.*, in the numbering of the regulatory provisions, in the days on which each plaintiff is required to report, as to whether each plaintiff is to report in writing or in person, and, in some instances, the travel

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state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.

(b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, provided that the term "associating" as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a).

(c) That said alien shall not violate Sec. 2385 of the "Smith" Act of June 25, 1948 (Section 2385 of Title 18, U. S. Code) and Section 4 of the Internal Security Act of September 23, 1950 (Sec. 783 of Title 50, U. S. Code).

limitation of 50 miles is omitted" (R. 162).[7]

All fourteen complaints contain a number of general allegations that the supervision orders are unreasonable and unnecessary (*e. g.*, R. 7–9), each alien specifically claiming that (a) he has always been available in the past, (b) he intends in good faith to continue to be available, and (c) there are no reasonable grounds from which to infer he will not continue to be available (*e. g.*, R. 8). In affidavits filed in support of motions for temporary restraining orders against the enforcement of the orders of supervision, appellants recite instances of personal inconvenience and loss of time (*e. g.*, R. 35, 41), and, in some cases, allege change or loss of employment claimed to be the result of the reporting requirements and restrictions (*e. g.*, R. 19–20, 26–27).

Some of the affidavits contain charges that the statutory provisions for medical and psychiatric examination are to be used to "lay the groundwork" for "brain washing" and "for declaring political dissidents insane" (R. 100, 109, 118). In virtually identical language, all fourteen affi-

[7] While the case was pending before the District Court, the fourteen orders of supervision were administratively modified in various respects which were called to that court's attention by an affidavit of December 12, 1954, which is set forth, in pertinent part, in Appendix B, *infra*, pp. 73–74. The principal modification, in addition to the liberalization of the reporting requirement already noted, *supra*, p. 10, fn. 5, was in providing a more convenient and centrally located place for reporting in New York City, thus avoiding the inconvenience of periodic trips to Ellis Island.

davits also express a fear that under the supervision orders they may be asked such questions as:

> * * * what I ate for breakfast, whether I had an argument with my wife, what friends I had dinner with, where I went on Saturday night, what I think of the war in Indo-China or the prospects of an economic depression. [R. 28, 35–36, 43, 73. See also R. 21, 54, 59, 66, 81, 88, 97, 102, 111 and 119.]

These particular charges are not supported by any factual allegations that any appellant had ever been requested, while under supervision, to report for or submit to any medical or psychiatric examination, or had ever been asked questions of the type set forth.[8]

The actual practices and policies followed in the New York District respecting these matters are stated in detail in an affidavit (R. 127–133), filed on behalf of appellee, which was not controverted by appellants and which states that appellants' charges have no reasonable connection with the law, regulations or manner in which the law has been and will be enforced (R. 129). Thus

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[8] In substantially similar language, a number of the affidavits allege questioning and delay upon the occasions for reporting but none of them sets forth any example of any specific question actually asked nor gives the least detail as to the conversations (R. 20–21, 28, 35, 42–43, 53–54, 58–59, 66, 73, 87). The questioning is uniformly characterized as "sweeping interrogatories as to my associations and activities" (*e. g.*, R. 21).

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medical and psychiatric examinations of aliens under supervision are in fact required only (a) where health certificates are requested by a foreign country before it will issue travel documents; (b) where necessary for the protection of the health of the alien or of others; or (c) to verify a claimed illness "so that an alien may be excused from any conditions of parole which may interfere with such person's health" (R. 129–131). Similarly, when aliens are subjected to questioning it is primarily to gain information required in the preparation of applications for travel documents and visas and to discover what efforts they are making to effectuate the ordered deportation (R. 131–133).

Not one of the fourteen complaints or supporting affidavits alleges that appellants have in any respect violated any provision of the challenged orders of supervision, or that they have sought administrative relief for any of their alleged difficulties. Moreover, the complaint in at least one case, that of appellant Jones, affirmatively shows that the provision prohibiting travel outside of a 50-mile radius from Times Square was in fact modified to permit her to stay at a health resort to recuperate from an illness.[9]

[9] See Exhibit A to appellant Jones' complaint, which, though not printed, appears at pp. 485–487 of the certified record. The exhibit also shows that this appellant's order was further modified, presumably to accommodate her particular health problem, to permit her to report in writing rather than in person. (See also R. 118–119, 131.)

2. *Proceedings in the District Court.* In each of the fourteen suits, the aliens, by orders to show cause (*e. g.,* R. 15–16) moved for a temporary injunction against enforcement of the orders of supervision, and were granted temporary restraining orders as regards some of the provisions of the challenged orders (R. 16; see also R. 140, 155–156). Appellee cross-moved, *inter alia,* to vacate the temporary restraining orders and to dismiss the complaints for failure to state a claim upon which relief could be granted (R. 124–126, 134–137).

A statutory three-judge court was convened (R. 145–149) and, after hearing argument, concluded that the fourteen complaints had been prematurely filed and failed to state a justiciable controversy between the parties (R. 163). In its opinion (per Medina, C. J.), the court pointed out that appellants had not violated the statute, and that appellee, the District Director, had neither the power to proceed against appellants for a violation nor had he or anyone else threatened to do so (R. 163–164). In so holding, the court relied, *inter alia,* upon the refusal of this Court, in *United Public Workers* v. *Mitchell,* 330 U. S. 75, to grant "advisory opinions upon broad claims of rights" (330 U. S. at 89) (R. 164–165). On December 1, 1954, the court entered a single judgment vacating the temporary restraining orders and dismissing the fourteen complaints

(R. 166–168). Appellants then took their direct appeal to this Court.

SUMMARY OF ARGUMENT

I

Appellants are aliens awaiting deportation. They do not and cannot here challenge their status as such deportable aliens. Nor do they allege that they have violated the statute, the regulation, or the requirements in the orders providing a degree of supervision pending the effecting of their deportation. Correspondingly, they cannot allege any threat of prosecution. Their complaint, in essence, is with respect to the inconvenience and alleged hardship of the various details of the supervision. The three-judge court below properly held that no justiciable case or controversy between the parties had been reached.

The question of the justiciability of appellants' claims is complicated by the unusually large number of broad constitutional issues raised, and by the wide variations in their relative degree of ripeness for judicial review. Some of the issues are non-justiciable because they rest entirely on speculation and fear that appellee in the future may possibly interfere in certain respects with appellants' rights. Such matters fall outside the scope of the constitutionally delegated judicial power. Many of the issues are non-justiciable because of appellants' failure to exhaust administrative remedies.

However, as to one issue, whether appellants can be subjected to any supervision at all, the problem of justiciability is a close one. Although this one issue seems to meet the superficial minimum constitutional requirements of a "case" or "controversy", it does not arise in a sufficiently concrete factual setting to meet those additional requirements of justiciability, developed as a matter of sound judicial discretion in such cases as *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222.

A. A large part of appellants' attack on the statute and the orders of supervision relate to their hypothetical speculations as to what may or may not happen under the orders of supervision. They ask this Court to give an advisory opinion as to whether appellants should or should not obey the statute enacted by Congress and the orders issued thereunder by the administrative authority which has been entrusted by Congress with the fixing of numerous discretionary details. Such a request does not present a justiciable case within the constitutional limits of the federal judicial power.

B. Appellants fail to set forth any efforts on their part to avail themselves of the discretionary latitude in the supervision. They allege no applications to obtain modifications of the supervisory provisions to the full extent permissible within the administrative process, even though

the record discloses that, where amelioration of the limitation on travel was requested upon a reasonable basis, the request was granted. It thus appears that the administrative process is far from exhausted, and the final factual situation is not yet before the courts in concrete form.

C. The single issue of whether it is *per se* unlawful and injurious for appellants to be subjected to any supervision whatsoever presumably gives rise to a present controversy, since appellants have in fact been subjected to supervision. However, the courts have wisely refused to exercise their discretionary authority to determine broad constitutional issues presented in cases having some of the elements of a present controversy, but where the indispensable concrete factual background is largely, though not wholly, *in futuro*. This is particularly true where, as here, ill-defined constitutional issues are raised, where the occasion for the imposition of enforcement sanctions has not yet arisen and may never arise, and where the litigants seek what is essentially an advance advisory ruling to determine the legal consequences of future conduct in which they desire to engage.

Should this Court conclude, in spite of the presence of these factors which are customarily held to preclude justiciability, that the issue of the constitutional right to supervise aliens awaiting deportation is ripe and appropriate for adjudication in this litigation, this is the only issue

which is properly before the courts. Appellants cannot, by raising this broad issue, require this Court to pass in advance on numerous details of a complex supervisory structure which are not bottomed on concrete, existing factual situations.

II

Assuming that the issue of the general right to supervise is justiciable, the judgment of the court below should be affirmed on the merits, since there can be no serious question of the power of Congress to require some supervision of aliens against whom unexecuted final orders of deportation are outstanding. Appellants have not contended that the orders for their deportation are defective or unlawful in any manner. Their status as undesirable aliens who should not be in the country at all is uncontroverted. As such, there is danger that they may attempt to disappear into the general population to frustrate deportation. Moreover, appellants, as members of the Communist Party, will probably continue to support the party, since even the former brake on such activity, through the threat of deportation, has now ceased. On this score, they have nothing more to lose. Appellants are not to be equated with ordinary citizens or resident aliens who do not have to be located for the purpose of deportation, and for whom the ordinary criminal sanctions against misconduct are sup-

plemented by a substantial stake in a long future life in the United States.

A. Appellants' special status, and the special safeguards necessitated by that status, dispose of their contentions that they are being unreasonably deprived of liberty or punished without a judicial trial. That special status, which is closer to that of an excludable than a resident alien, clearly justifies some form of special treatment. The treatment specified by Congress, which is not detention, but is not yet full and absolute freedom, is reasonable. Supervision which is in many ways less burdensome than that normally imposed on members of the armed forces cannot be equated to imprisonment or other punishment. Nor can reasonable restrictions on freedom of movement. Such supervision and restrictions bear a direct relationship to the purpose of the statute of keeping deportable aliens from vanishing into the general population and using their freedom to the detriment of internal security. It was recognized in *Carlson* v. *Landon,* 342 U. S. 524, that aliens who are only in the course of proceedings for deportation may pose a variety of problems warranting their being placed in actual custody as a precautionary measure. The need is the more pronounced when, as here, the aliens are not merely awaiting a finding that they are deportable but have actually been found so.

B. Since appellants, as deportable aliens whose deportation has not been effected, are clearly in a special class, reasonable statutory provisions limited to that class do not involve any unreasonable classification and do not deny appellants equal protection of the laws.

C. The statute is not unconstitutional in imposing criminal penalties upon conduct by persons in a status—*i. e.,* deportability—which is arrived at administratively. The offense does not consist in becoming deportable, but in willful acts which take place thereafter, in violation of supervisory restrictions pertinent to persons awaiting deportation. The statute is not invalid merely because it attaches criminal consequences to conduct of persons who violate administrative determinations. The courts have long sustained criminal penalties for violations of administratively issued selective service orders, price control regulations, rate regulations, license requirements, and the like.

D. Appellants' indirect challenge of the deportation order on the ground that the statute authorizing deportation of alien members of the Communist Party is a bill of attainder or *ex post facto* law has been disposed of on direct challenge in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Galvan* v. *Press,* 347 U. S. 522.

E. Appellants' contention that unconstitutional delegation and usurpation of legislative power is here involved, is mere reargument of what has

been settled, *a fortiori,* in *Carlson* v. *Landon,* 342 U. S. 524, 542–544. As there pointed out, an appropriate standard, under which executive and administrative agencies are to operate, need not prescribe each detail for decision, but the Congress may rest upon the guidance furnished by the policy of the legislation. Here, as in *Carlson,* the basic policy, "to guard against Communist activities" (342 U. S. at 544) provides a sufficient guide for administrative action. The standard was held adequate in *Carlson* for the more drastic discretionary action of deciding, prior to final determination of deportability, on custody for the alien as against enlargement, even though the statute was less specific than the one here involved. The present statute is clearly adequate for the less drastic administrative details of supervision challenged in this case.

III

Appellants' attacks on the orders of supervision, insofar as they go beyond a general attack on the right to supervise at all, are based largely on speculation as to what might occur, or involve matters as to which there has been no exhaustion of administrative remedies.

The right to supervise clearly implies the right to require some reporting by aliens, notification of change of address and limitations on travel without permission beyond a reasonable radius. The provision for medical and psychiatric exami-

nation is reasonably necessary to enable the government to obtain the information demanded by foreign countries who may be willing to take the aliens.

The right to supervision also carries with it the right to require persons subject thereto to answer questions as to whether the various provisions are being obeyed. Appellants' speculation that they may be asked questions which are irrelevant or which may tend to incriminate them cannot form the basis of an attack on the orders, in the absence of a showing that such anticipated events have in fact occurred. Such issues can be litigated as they arise. The orders of supervision refer merely to the furnishing of "such information as may be deemed fit and proper".

The provisions against further support of the Communist Party are reasonable in the light of the fact that the aliens are being expelled because of their membership in the Communist Party.

Improper delegation or usurpation is not established, as appellants here contend, by conjecture as to hypothetical excesses which an administrative official might seek to justify as within the scope of the delegation. No such excesses appear in the present supervisory orders.

Appellants' complaint concerning vagueness, when stripped of its commingling with other types of complaint, narrows down to an attack on the requirement that appellants must cease affording support to the Communist Party or its policies

and refrain from associations with persons affording such support. There is no genuine occasion for appellants to misunderstand the requirement. The language specifically provides that it is not to apply to association with members of the family or legal counsel for purposes not in furtherance of the party policies. With respect to any doubtful, borderline activities or associations, appellants can make inquiry of the administrative authorities. Moreover, sufficient protection against any genuine slip-up or misunderstanding is afforded by the statutory requirement that a violation be willful or knowing.

ARGUMENT

I

THERE IS NO CASE OR CONTROVERSY APPROPRIATE FOR JUDICIAL DETERMINATION

In this litigation, appellants make a broad constitutional attack on the validity of Section 242 (d) of the Immigration and Nationality Act of 1952, *supra,* pp. 4–5, and on the orders of supervision issued thereunder. Before reaching the merits,[10] this Court must determine whether the three-judge court below correctly held that appellants' suits were prematurely brought and raised no justiciable controversy between the parties.

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[10] The merits are discussed *infra*, pp. 39–69.

The abstract principles which govern whether a claim involves a case or controversy appropriate for judicial determination are well recognized and are not in dispute. See, *e. g.*, *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222, 224 (dissenting opinion of Mr. Justice Black). Yet great difficulty frequently arises in the proper application of these principles to specific situations. While all agree that remote or abstract or hypothetical problems are nonjusticiable, there has been substantial disagreement in a number of close cases as to how to determine whether a particular matter has become sufficiently well-defined and concrete to permit a proper and wise exercise of the judicial function. See especially *International Longshoremen's Union* v. *Boyd, supra; Adler* v. *Board of Education,* 342 U. S. 485; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U. S. 541; and *United Public Workers* v. *Mitchell,* 330 U. S. 75. See also Davis, K. C., *Ripeness of Governmental Action for Judicial Review,* 68 Harv. L. Rev. 1122–1153, 1326–1373. In short, while this Court's decisions are in general agreement as regards the principles, it is in some instances hard to reconcile their application.

In the instant case, the customary difficulties are intensified and further complicated by the unusually large number of broad constitutional issues raised, and by the wide variations in their

relative degree of ripeness for judicial review. Some of the issues arise solely from alleged fears of possible future interference with appellants' constitutional rights; such matters are so speculative and remote as certainly to fall outside the constitutional concept of "case or controversy" which limits the federal judicial power (see *infra,* pp. 27–29). Many of the issues relate to matters as to which appellants have neither sought nor exhausted readily available administrative remedies, and hence which are not justiciable as a matter of universally accepted judicial policy (see *infra,* pp. 29–32). No serious question can be raised that in so far as this litigation involves issues of these two types, the holding of the court below that there is no justiciable controversy is correct.

However, appellants' pleadings raise at least one issue as to which the problem of justiciability is both difficult and close. This is the question whether appellants can be subjected to any supervision at all, pending their ultimate deportation, wholly irrespective of any particular terms which may be administratively imposed, and assuming that full allowance will be made administratively for individual problems involving personal hardship. This one issue seems to meet the minimum constitutional requirements of a "case" or "controversy". Nevertheless, it does not here appear to arise in a sufficiently concrete and definite factual setting to meet those additional requirements of justiciability which this Court has de-

veloped, in the light of experience and as a matter of sound and wise judicial administration, in such cases as *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222 (see *infra,* pp. 32–39).

A. HYPOTHETICAL ISSUES, BASED ON SPECULATION AND FEAR THAT APPELLEE IN THE FUTURE MAY POSSIBLY INTERFERE WITH APPELLANTS' RIGHTS, ARE NOT JUSTICIABLE UNDER THE CONSTITUTION

The basic constitutional requisite for an exercise of the federal judicial power, under Article III, Section 2 (App. A, *infra,* p. 70), is the existence of a "case" or "controversy". Although this term is, of course, undefined by the Constitution, its general meaning has been authoritatively developed by the past decisions of this Court. Among the universally accepted constitutional requisites for justiciability is that substantial legal rights must have been subjected to imminent invasion rather than to speculative or remote or contingent impairment. See *e. g., Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162; *Stearns* v. *Wood,* 236 U. S. 75, 78; and cases collected in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461.

Some of the issues here raised by appellants unquestionably fail to meet this constitutional limitation. For example, each appellant challenges the constitutionality of the requirement contained in Section 242 (d), *supra,* pp. 4–5,

and in the orders of supervision that they "submit, if necessary, to medical and psychiatric examination".[11] Yet their pleadings contain not a single allegation that even one of them has ever been requested, following their subjection to supervision, to report for or to submit to any such examination.[12] Similarly, appellants' wholly conjectural fears as to the type of questioning to which they might be subjected (quoted *supra*, p. 13) are equally remote and hypothetical and unsupported by the elements of any present controversy. Determination of theoretical issues of this type which might possibly arise in the future falls squarely beyond the scope of the constitutionally delegated judicial power.

As for the remaining issues, the solution does not appear to rest solely on constitutional grounds. No precise test as to the exact constitutional limits of the federal judicial power has or can be formulated. Necessarily the matter is one of degree. Cf. *Maryland Casualty Co.* v.

[11] In the orders of supervision, the wording "said alien shall *upon request* * * * submit * * * to medical and psychiatric examination" (R. 13) is used. (Emphasis supplied.)

[12] The record affirmatively shows the circumstances under which medical and psychiatric examinations may be occasionally necessary and properly required (R. 129–131). Appellants' suggestion that they may be compelled to report for such examinations two or three times a day (Br. 47) are of course utterly ridiculous. Such extreme speculation involves no possible present interference with appellants, and presents no matter within the constitutional power of the courts.

Pacific Coal & Oil Co., 312 U. S. 270, 273. However, in determining whether any particular claim is properly justiciable, there is generally no occasion to adjudicate these constitutional limits with exactness. This is because the courts have developed various self-imposed limitations in the field of justiciability. These limitations are particularly applicable where, as here, a decision is sought on complex and ill-defined constitutional questions. Thus as a matter of wise judicial discretion, developed in the light of experience and on the basis of powerful considerations of policy, the courts will not decide issues—especially constitutional issues—which do not appear to be sufficiently ripe for proper adjudication, even though minimum constitutional requisites for justiciability are present. Such ripeness does not exist here, owing, *inter alia*, (a) to appellants' obvious failure to exhaust their administrative remedies (see *infra*, pp. 29–32) and (b) to their seeking what is essentially an advisory determination of the legal consequences of desired future conduct, rather than a vindication of rights already subjected to immediate interference (see *infra*, pp. 32–39).

B. APPELLANTS HAVE FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES

Appellants have, of course, been notified through the orders of supervision that they have become subject to the requirements of Section

242 (d). They have also been notified as to the specific terms which have initially been deemed appropriate in their particular case. However, these orders are not fixed once and for all, and are subject to substantial modification, either on *ex parte* action by the administrator or on application of the alien (see App. B, *infra,* pp. 74, 75).

Appellants are here asking this Court to declare invalid the orders of supervision and the statute pursuant to which the orders were issued, without having exhausted available administrative relief. In their anxiety to get an immediate judicial decision on the complex constitutional issues which they raise, they have totally disregarded the ready availability of administrative relief to provide appropriate adjustment of their orders of supervision in the event of any genuine hardship.[18] The Court cannot be asked to speculate

[18] Appellants' quotation from the opinion below (Br. 14), to the effect that the District Director "has no power to take any further action beyond what he has already done", misconceives the import of the observation. The language appears, not in any context indicating that the Director could not adjust the supervisory requirements, but only in connection with the court's observation that the Director would not be the one to take the further steps in prosecution; the court said, "it is the Attorney General or the United States Attorney * * * who will determine whether or not [appellants] or any of them should be prosecuted" (R. 163–164). See also the earlier portion of the opinion which states (R. 162): "[N]o action of any kind * * * has been taken or threatened by the defendant. Moreover, as will be shown later in this opinion, the defendant has no authority to take any further action."

that, if any appellant had presented or should in the future present to the administrative authorities such facts as, for example, the conflict of a required reporting date with an important working date, the authorities would arbitrarily refuse to make any reasonable change of the date, or would deny him any right truly his.

Indeed, as the record shows, in at least one instance where actual facts of hardship were called to the attention of the administrative officials, the requirement of reporting in person was wholly eliminated and permission to remain outside the 50-mile travel radius was granted (R. 131). Additional modifications, alleviating in substantial part specific hardships complained of by appellants, have since been administratively made and called to the attention of the court below (see fn. 7, *supra,* p. 12; and App. B, *infra,* pp. 73–74). Until such administrative relief is fully availed of, no properly justiciable issues are raised as to all matters involving a possibility of revisory administrative action, and this involves almost every one of appellants' contentions challenging the validity of the statute "as applied" (Br. 4–5).

The case, therefore, in substance, poses a question similar to that involved in any case of failure to exhaust administrative remedies. See ***Myers*** v. ***Bethlehem Shipbuilding Corp.,*** 303 U. S. 41, 50–52; ***Macauley*** v. ***Waterman Steamship Corp.,***

327 U. S. 540, 544. The application of this doctrine to immigration cases is described in *United States* v. *Sing Tuck,* 194 U. S. 161. If appellants hereafter avail themselves fully of their administrative remedies they may, in the first place, be afforded such rulings as will make unnecessary any recourse to the courts. If, on the other hand, the result of the administrative proceeding is adverse to the individual involved, the case will then reach the courts in a definite form with findings of fact and expert interpretations, made in the light of a specific factual background, which will narrow and eliminate extraneous and unessential issues. The effect, of course, of permitting a suit to be tried in court before it has followed its natural course through administrative proceedings, is to shift burdens to the courts which Congress intended to be resolved in the first instance by the special procedures it has provided.

C. UNDER CONTROLLING PRIOR DECISIONS, BROAD AND ILL-DEFINED CONSTITUTIONAL ISSUES ARE NOT APPROPRIATE FOR JUDICIAL DETERMINATION, WHERE THE OCCASION FOR THE IMPOSITION OF ENFORCEMENT SANCTIONS HAS NOT YET ARISEN AND MAY NEVER ARISE

1. After eliminating from this case all issues of the two types discussed above (pp. 27–32), there still remains one contention as to which the matter of justiciability is relatively close and difficult, and which appears to meet the minimum constitutional requirements of an actual "case" or

"controversy". This contention is that it is *per se* unlawful and injurious for appellants to be subjected to any supervision whatsoever, irrespective of what its terms may be. However, even though a present controversy on this issue may exist in the constitutional sense, it does not necessarily follow, as a matter of proper judicial administration, that the controversy is necessarily sufficiently developed to be ripe for adjudication. Thus the courts have wisely refused to exercise their discretionary authority to determine broad constitutional issues presented in cases having some of the elements of a present controversy, but where the indispensable concrete factual background is largely, though not wholly, *in futuro*. *E. g., United Public Workers* v. *Mitchell,* 330 U. S. 75; and *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222. This is particularly true where, as here, ill-defined constitutional issues are raised, and the litigants seek what is essentially an advance advisory ruling to determine the legal consequences of future conduct in which they desire to engage (*ibid.*).

Under this Court's recent decisions in the two above cited cases, when a statute imposes restrictions or consequences upon specified conduct, no justiciable controversy can be built upon a mere allegation of a desire to act in the future in a manner contrary to the statutory restrictions. Instead, there must be the actual posing of a controversy in factual detail, with no remaining

area for further revisory administrative action, which by amelioration or definition of the restrictions, might render judicial intervention unnecessary or lead to a different ultimate judicial decision. In the *International Longshoremen's* case, the law as well as its basis in reason is concisely summarized as follows (347 U. S. at 224):

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

In the instant case, it is highly significant, in determining the matter of justiciability, that appellants have not in any way violated the orders of supervision, so that no occasion for the imposition of enforcement sanctions has yet arisen. Furthermore, such an occasion may never arise.

However, appellants have in fact been notified that they are subject to supervision, as required by Section 242 (d), and have been directed either to take or to refrain from taking certain specified action. Thus this Court would appear to have constitutional power to adjudicate appellants' general contention that, although they are aliens against whom a final order of deportation has been made on the ground of membership in a subversive organization, they have a constitutional right to be free from all supervision pend-

ing eventual deportation. As to this one issue, the matter of justiciability is close. The decision calls for a delicate adjustment between powerful and closely competing policy considerations. On balance, the court below appears to have solved this matter correctly, in holding that no justiciable controversy had been alleged, as more fully appears from the further analysis which is set forth in Appendix C, *infra,* at pp. 78–83.

However, this Court may conclude that the balance inclines very slightly in favor of holding that appellants' attack on the statutory power of supervision is sufficiently ripe for determination, even though (a) there has been no exhaustion of administrative remedies, (b) a complete concrete factual setting is lacking, and (c) *United Public Workers* v. *Mitchell,* 330 U. S. 75 (discussed in Appendix C, *infra,* pp. 78–80), on which the three-judge court placed principal reliance (R. 164) in dismissing appellants' complaints, appears to hold otherwise.

If this Court should so hold, this is the only point which would be ripe for decision.[14] Such a contention cannot serve as a device for opening the door of the courts to the main thrust of the complaints, which seek adjudication as to a miscellany of alleged inconveniences and hardships that have not yet crystallized into an actual case

[14] The lack of merit in such attack is discussed, *infra,* pp. 39–69.

within the constitutional limits on justiciability. If a broad, untenable contention carries with it the right to obtain an adjudication of many details which have not developed into a real controversy, the constitutional limitation on the jurisdiction of courts is circumvented by the simple expedient of broad pleading. As to all problems beyond the general one of the right to exercise any supervision at all, the decisions of this Court above cited are clearly controlling (*supra,* pp. 27, 31–32).

2. Appellants cite Section 10 of the Administrative Procedure Act (App. A, *infra,* pp. 70–72) as an express authorization of their proceeding (Br. 11–12, 17). However, this Act is manifestly inapplicable to the major portion of the complaints, which presents objections to various details and provisions of the supervisory requirements which necessarily are committed to the discretion of the administrative agency, and as to which administrative remedies have not been exhausted. The Act did not change the rule requiring exhaustion of administrative remedies before judicial relief becomes available. Nor does it alter the accepted concepts, discussed *supra,* pp. 32–35, relating to ripeness for adjudication and the requirement of a factual background sufficiently concrete to permit a proper exercise of the judicial functions. Furthermore, the mere invoking of the Act does not conclude the basic question of justiciability here discussed, since no statute is to be read as con-

ferring jurisdiction for judicial review in contravention of the constitutional limitation of jurisdiction to actual cases and controversies (see, *supra,* pp. 27–29).

Appellants attempt to shore up their claim of justiciability by putting emphasis upon their request for a declaratory judgment (Br. 17–19). The declaratory judgment process is not only governed by the same basic constitutional requirement as other litigation in the federal courts, but is specifically restricted by its own statutory authorization to "a case of actual controversy." 28 U. S. C. 2201, App. A, *infra,* p. 70. Moreover, invoking this remedy does not in any way obviate the need to exhaust administrative remedies; and, in any event, the award of such relief is a matter of sound judicial discretion. Particularly pertinent is the language of *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (cited with approval in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 90):

> The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision, * * * or to formulate a rule of constitutional law

> broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied, * * *. [Asterisks indicate citations of authorities.]

The numerous decisions cited by appellants (Br. 11–19), far from sustaining appellants' position, are so substantially different in factual posture that they do not support the claim of justiciability. In comparison with the holdings and quotations upon which appellants rely, it is evident that the bulk of appellants' complaint is directed, not against a final order inflicting substantial irremediable damage but rather against a continuing group of discretionary supervisory requirements, which can and would be modified upon application in any required reasonable degree.

In sum, the Court is thus confronted with little more than an effort to induce it to give an advance advisory opinion as to what the administrative authorities could or should rule, without opportunity on the part of the administrative authorities first to complete the administrative process so that a concrete factual issue would be presented. Accordingly, no properly justiciable case or controversy has been reached. Such a premature, generalized attack upon an enactment clearly falls within the condemnation of *Electric Bond Co.* v. *Securities and Exchange Comm'n.*,

303 U. S. 419, 443, concerning "a variety of hypothetical controversies which may never become real" and concerning an attack on "statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived."

II

THE PROVISION FOR GENERAL SUPERVISION OF ALIENS ORDERED DEPORTED WHOSE DEPORTABILITY HAS NOT BEEN EFFECTED IS CONSTITUTIONAL ON ITS FACE

As discussed, above, at pp. 35–36, even if a justiciable controversy should be deemed to exist in the instant case, the only question which could be open at this time would be the general right of supervision. Since appellants are presently subject to supervision, this Court may decide that they have sufficient standing to test that general right in this litigation, even though the District Director of Immigration, under whose supervision appellants are, has no authority himself to institute a prosecution of appellants for failure to obey the orders of supervision and no prosecution has been started or threatened. Assuming that this one issue is open, the judgment of the court below should be affirmed on the merits, since there can be no serious question of the power of Congress to require some supervision of the aliens here involved.

Preliminary to a more detailed analysis of appellants' contentions, it is necessary to note

certain basic aspects of the problem which appellants ignore throughout their brief, but which are of the greatest importance in every phase of the analysis.

First, it must be kept in mind that appellants at no point contend that they are not rightfully being deported, nor do they claim that the administrative proceedings in which they were ordered deported were procedurally defective or unlawful in any manner. The status of appellants as undesirable aliens is accordingly clear and uncontroverted. Secondly, this status of appellants as deportable aliens sets them apart from citizens and other resident aliens. Persons in appellants' status have an unusually strong motivation to disappear into the general population of the country in order to avoid deportation. In addition, appellants have in the past supported the Communist Party as members. Now, with deportation only a matter of time, they are relieved of one of the few deterrents—and perhaps the only potent deterrent—of such support, *i. e.*, the fear of deportation.

The legislative and executive branches of the government are thus confronted with concrete, actual problems. They should not be lightly relegated, in discharging the responsibility resting upon them, to mere acceptance of the assurances of persons having such a record, that they will appear when deportation is arranged, and

that they will not participate in subversive activities if allowed unlimited associations with or employment by members of the Communist Party.

These aliens have been found, pursuant to law, to have no legal right to be in this country. They are here only because it has not proved possible to deport them. If Congress has the power to expel them from the country entirely, *Galvan* v. *Press,* 347 U. S. 522, it must clearly have the power to deal with the situation here presented. Although theoretically appellants should not be here, they may in fact be here for considerable periods of time. Congress has developed a reasonable and practical solution for this practical problem. It has decreed that the aliens shall not be kept in detention indefinitely, but shall be subject to such supervision as will tend to insure their deportability when that can be effected and also to prevent the freedom thus granted from being used to the detriment of the internal security of the United States. At a time when it remains necessary to call citizens into the armed forces of the nation, involving for such citizens grave impact upon their customary liberty, it is clearly not unreasonable to direct proper supervision of aliens whose past record discloses a contribution to the source of the current, all-pervading danger.

A. NO UNCONSTITUTIONAL DEPRIVATION OF LIBERTY AND NO PUNISHMENT IS IMPOSED BY THE STATUTE

The basic considerations just discussed are in themselves an answer to appellants' contention (Br. 24–30) that supervision deprives them of their liberty "without judicial trial." The special status of appellants as deportable aliens who have not yet been deported manifestly justifies some form of special treatment. The treatment specified by Congress, which is not detention, but is not yet full and absolute freedom, is clearly reasonable. Supervision which is substantially less burdensome than that normally imposed on members of the armed forces cannot be equated to a real administrative deprivation of liberty such as the imprisonment and hard labor provision of *Wong Wing* v. *United States,* 163 U. S. 228. In many of its aspects it is no more burdensome than the requirements imposed by many civilized countries on all aliens in their midst. It does not become "deprivation of liberty without judicial trial" and "punishment" merely because appellants choose to call it such. It remains a mild form of supervision.

This Court, in *Carlson* v. *Landon,* 342 U. S. 524, in upholding the statute authorizing the Attorney General, in his discretion, to hold an alien in custody pending determination of deportability, stated (pp. 534, 537–538):

> The basis for the deportation of presently undesirable aliens resident in the

United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.

* * * * *

Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution. Since deportation is a particularly drastic remedy where aliens have become absorbed into our community life, Congress has been careful to provide for full hearing by the Immigration and Naturalization Service before deportation. Such legislative provision requires that those charged with that responsibility exercise it in a manner consistent with due process. Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. * * *

The final sentence of the foregoing quotation is, *a fortiori,* applicable in full justification of the power to prescribe reasonable regulations for the supervision of aliens, especially when such aliens are not merely awaiting a finding that they are deportable but actually and finally have been found deportable. Such regulations are clearly needed in order to insure the aliens' presence for deportation when that can be effected and in order to prevent the intervening period, a period of relatively general freedom, from being used to the detriment of the United States, particularly in the deleterious manner which was the reason for the deportation in the first place. An alien does not become less likely to disappear and less likely to be dangerous to the United States when he has finally been ordered deported and thus is no longer deterred in any degree by the desire and prospect of continued residence in the United States.

What has been pointed out, *supra,* pp. 39–44, concerning the clear needs and purposes of the precautions with respect to aliens in the status of appellants, likewise disposes of their contention that they are being "punished" (Br. 31–34). It is a common fact of present-day life and law that public needs impinge, in an unending array of instances, upon the liberties and property of various classes of individuals, *e. g.,* the induction requirements of the selective service system. Appellants concede that the impact on the indi-

vidual becomes a "punishment" only in the absence of a reasonable relation of that impact to the public need which is sought to be met (Br. 31). Appellants make no showing of any aim on the part of either Congress or the executive branch to employ the supervisory program for any punitive purpose or, indeed, any purposes other than the obvious purposes incidental to the conceded right to deport and the right and duty to safeguard the nation as to this particular type of alien.[15]

In this connection, appellants contend that *Wong Wing* v. *United States*, 163 U. S. 228, forbids the government not only to hold in custody but "otherwise to restrict the liberty of deportable aliens" (Br. 25, 27). The decision supports no such contention. In *Wong Wing* there was not, as here, a regulatory program having as one of its direct and obvious objectives the assurance of the alien's presence when deportation can be effected, and the safeguarding against the lessened sense of responsibility of an alien who has lost all

[15] To the extent that details of supervision are required by the statute itself, issues as to the reasonableness of such requirements on their face may be said to be involved in the more general issue of the right to supervise. The general requirements are, however, so clearly a concomitant of any power to supervise at all, and appellants' objections thereto are so intertwined with their speculations as to what may occur in the future under the orders of supervision that we discuss these matters in Point III, *infra*, pp. 60–69, dealing with the orders of supervision.

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stake in the country. In *Wong Wing* there was, instead, complete custody for a fixed period unrelated to any time in which deportation would become available. As distinguished by the Court itself (163 U. S. at 236):

> There is an evident implication, in this language, of a distinction between those provisions of the statute which contemplate only the exclusion or expulsion of Chinese persons and those which provide for their imprisonment at hard labor, *pending which their deportation is suspended.* [Emphasis supplied.]

The imposition on Wong Wing of "infamous punishment at hard labor" (163 U. S. at 237)) could not be related to his expulsion in any respect, except as punishment. As pointed out by the Court, the term of imprisonment delayed the expulsion, whereas in the instant case, the modest supervision is in large part directed toward assuring the expulsion at the earliest possible time.[16]

This reasonable supervision, which is directly related to the particular status of appellants as

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[16] Clearly inapposite are a group of appellants' citations dealing with instances of actual custody, rather than the limited supervisory restrictions of the instant case, *i. e.*, *Ross* v. *Wallis*, 279 Fed. 401 (C. A. 2); *Sakzagansky* v. *Weedin*, 53 F. 2d 13 (C. A. 9); *Mezei* v. *Shaughnessy*, 195 F. 2d 964 (C. A. 2), reversed as inapplicable to an excludable alien, 345 U. S. 206; *Dzuro* v. *District Director*, 102 F. Supp. 704 (S. D. N. Y.); *Kusman* v. *District Director*, 117 F. Supp. 541 (S. D. N. Y.); *Blankenstein* v. *Shaughnessy*, 117 F. Supp. 699 (S. D. N. Y.). *Petition of Brooks*, 5 F. 2d 238

aliens who have been ordered deported, is not transformed into "punishment" on the basis of appellants' dubious assertions that no country will ever accept them and that they may thus be subject to supervision indefinitely. One cannot undertake here to assess the international situation for the balance of each appellant's life. Moreover so long as the current dangers exist, safeguards against the dangers will remain safeguards, and are not to be confused with punishment merely because of their duration. There must continue, as an incident to deportation, a means of protecting the nation against a clear consequence of every order of deportation, *i. e.*, the lessened control over the alien in removing the influence of the former prospect of being able to remain resident in the United States. Cf. *Shaughnessy* v. *Mezei*, 345 U. S. 206, holding that there was no limitation on the time an excluded alien, whom no other country would receive, could be held in custody.

Appellants, after full and fair hearings resulting in findings that they are undesirable as per-

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(D. Mass.) included broad language to the effect that any control of freedom was illegal but the actual decision was directed to the lack of jurisdiction of *a court* in the absence of statutory authority to direct periodical reports and bond by a deportable alien. Even with respect to this limited aspect of the *Brooks* holding, it was pointed out in *Dzuro*, 102 F. Supp. at 706, that "Congress was careful to abolish the rule of Petition of Brooks that enlargement after entry of order must be unconditional".

manent residents of the United States, and after orders for their deportation which have been presently frustrated but neither abrogated nor determined to be permanently unenforceable, constitute a group more properly comparable to excludable aliens than to the ordinary resident alien. As such, they might perhaps be subject to actual custody, but nothing remotely approaching custody is involved in the limited supervisory precautions taken with respect to them. To the narrow extent that the precautions may affect appellants' liberty, there is overwhelming counterbalancing necessity in the need to assure enforcement of the deportation orders and to prevent further conduct harmful to the United States.

B. THERE IS NO DENIAL OF EQUAL PROTECTION

With respect to the complaint that a denial of equal protection of the laws is involved in the instant case (Br. 34–37), it is necessary only to turn to appellants' own recognition that what is constitutionally objectionable is an arbitrary or unreasonable classification of persons upon whom duties and limitations are imposed (Br. 35). What we have reviewed above (pp. 39–48) emphasizes the exceptional nature of appellants as aliens who have been ordered to be expelled as soon as possible because of their past contribution to a subversive influence within the country. The need of assuring the expulsion, and of safeguarding against further deleterious conduct

meanwhile, is not equalled (even approximately) by any factual situation in the cases cited by appellants, and that need serves fully and adequately to warrant the special provisions made with respect to aliens of appellants' class.

C. THE FACT THAT ORDERS OF DEPORTATION ARE ISSUED PURSUANT TO ADMINISTRATIVE PROCEEDINGS DOES NOT MAKE UNCONSTITUTIONAL THE IMPOSITION OF CRIMINAL PENALTIES, SUBJECT TO TRIAL BY JURY, UPON PERSONS UNDER SUCH ORDERS WHO THEREAFTER WILLFULLY AND KNOWINGLY VIOLATE THE SUPERVISORY PROVISIONS

Appellants argue that the instant statute is unconstitutional because it imposes criminal penalties for certain conduct by persons who are subject to deportation orders which are, in turn, issued pursuant only to administrative proceedings (Br. 20–22). Appellants contend that there are thus two elements in the crime, of which one element—issuance of the deportation order—is not reserved for trial in a court.

This contention ignores the fact that the merits of whether the offender should or should not have been ordered deported are not made a part of the crime. The essence of the offense is willful conduct which takes place *after* the issuance of the administrative order.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legislation is not invalid because the crimes peculiarly associated with the specific status or duties may later indirectly rest upon

the administrative determination. Thus a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body.

Perhaps the most significant analogy is the long-standing selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials, yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox* v. *United States,* 332 U. S. 442, 453:

> The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order.

Similarly, price controls established by administrative proceedings were upheld in *Yakus* v. *United States,* 321 U. S. 414, this Court stating (pp. 444–445):

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of

> the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.
>
> * * * * *
>
> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U. S. 56, 81; *United States* v. *Adams Express Co.,* 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [citing decisions] * * *

In short, there is no constitutional objection to the imposition of duties or consequences in connection with administrative findings.

Here again, appellants' argument rests on a misinterpretation of the decision in *Wong Wing* v. *United States,* 163 U. S. 228. The *Wong Wing* case involved an entirely different type of statute,

under which the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence was to result, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U. S. at 237). There is a clear and fundamental difference between an administrative finding automatically imposing punishment, and a group of provisions, as in the instant statute, imposing supervisory requirements, pertinent to an administratively-determined status, and providing for criminal punishment only upon judgment *in a criminal trial* that the requirements have been *willfully* violated.

There is not even involved here the problem, which is raised in the dissenting opinion in *United States* v. *Spector,* 343 U. S. 169, 174–180, of whether, in a criminal prosecution for violation of the conditions of supervision, appellants would have the right to contest the validity of the deportation orders. Appellants are not being and have not been threatened with any criminal prosecution. They are not attacking the validity of the deportation orders. They are seeking to have invalidated the provisions of supervision, regardless of the validity of the deportation orders. The statute as such is not to be invalidated upon the two-fold assumption, which is not presented by the facts of this case, (1) that the order of deportation may possibly be found to

have been entered without jurisdiction and (2) that, in a criminal prosecution, no challenge to the validity of such order will be permitted. That problem can be met when it arises. The only issue here is whether, on the basis of a finding of deportability, appellants can be subject to reasonable regulation based on the status of deportability. Under the decisions cited above, they can be so regulated, even though the status of deportability was administratively determined.

D. NO BILL OF ATTAINDER OR EX POST FACTO LAW IS HERE INVOLVED

Appellants, in contending that the statute constitutes a bill of attainder and *ex post facto* law, relate the criminal penalties imposed upon conduct of deportable aliens back to the deportation order and, without explaining the failure to challenge the order directly and in an appropriate forum, now attack the provisions of Section 241 of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. 1251, which designate membership in the Communist Party as a basis of deportation (Br. 23).

To the extent that the contention can be said to be directed at the supervision provision of the statute, the argument exhibits the pervading error of treating the criminal penalties as imposed in punishment of the acts leading to deportation rather than for acts done in violation of the supervisory restrictions, long after the order of deportation.

To the extent that appellants here seek to present the challenge which they failed reasonably and properly to present against the deportation order itself—that deportability has been found against them because of membership in the Communist Party—they are merely attempting to reargue issues determined against them in *Galvan* v. *Press,* 347 U. S. 522, and *Harisiades* v. *Shaughnessy,* 342 U. S. 580.

E. NO UNCONSTITUTIONAL DELEGATION OR USURPATION OF LEGISLATIVE POWER, OR UNCONSTITUTIONAL VAGUENESS IS INVOLVED

Appellants, in attempted reargument of the adjudicated law set forth in *Carlson* v. *Landon,* 342 U. S. 524, 542–544, contend that there is here involved an unconstitutional delegation, redelegation, or usurpation of legislative power (Br. 37–42). This Court, in *Carlson,* stated with respect to the much greater discretion as to enlargement on bail or total custody pending the mere determination of deportability (342 U. S. at 542–544):

> * * * We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. * * *
>
> * * * The legislative judgment of evils calling for the 1950 amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act. So far as pertinent to these

> proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503, 515. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings. * * *

As in the case of outright detention, the authority to supervise aliens such as appellants, under orders of deportation, is to be exercised within the framework of the legislation designed to assure appellants' availability for deportation and "to guard against Communist activities" pending deportation.

Many of the specific provisions of the order of supervision do not pose any question of delega-

tion. It is the statute itself which requires the appearance from time to time before an immigration officer for identification; the medical and psychiatric examination, if necessary; and the giving of information as to nationality, circumstances, habits, associations, and activities.[17] It is only the remaining area of discretion, as to the time and extent of application of these requirements and of further reasonable restrictions on conduct to be prescribed, that can be challenged as delegated, and it is precisely in this area that a statutory provision for each detail in the case of each group of aliens would be an impossibility. Moreover, it is precisely in this area that the supervisory requirements, as presently ordered, most clearly are in accord with the policy of the legislation, albeit that policy is not, and cannot be, reduced to specific detail. To repeat the language of *Carlson* v. *Landon,* 342 U. S. at 542, "Congress need not make specific standards for each subsidiary executive action in carrying out a policy."

For instance, Congress has written into law a clear policy that aliens may not be members of

[17] As noted in footnote 15 *supra*, p. 45, while these general statutory requirements may be said to be involved in the right to supervise at all, the particular issues raised by appellants are discussed in relation to the orders of supervision, in Point III, *infra*, pp. 60–69.

the Communist Party.[18] This is a firm standard, set forth by provisions for deportation, for actual detention of six months if necessary, and supervision thereafter—the enlargement under supervision obviously reflecting the balancing of humanitarian considerations against the risks of further deleterious conduct by the aliens. Any greater detail in the setting forth of the standard in the statute would present an insurmountable task of draftsmanship and would serve only to decrease the flexibility now permitted in deference to the various needs and conditions of these aliens.

In their argument (Br. 40–41) that the instant orders usurp legislative power in disregarding other legislation (which provides that membership in the Communist Party is not to constitute a crime in itself) appellants again totally disregard the fact that any criminal consequences emanate from violation of the special provisions relating to the conduct of aliens ordered deported. Such aliens' past membership entails no criminal

[18] While the provision that the alien refrain from membership in the Communist Party is not explicitly set forth in the statute here involved, it is so clearly required by the legislative policy and it so clearly will not, in its broad aspects, be withdrawn, that this provision too can be said to be involved in the issue of the right to supervise. We discuss this point further in Point III, *infra*, pp. 64–67, and point out there that appellants' attacks on the specific language of the order do not present an issue ripe for adjudication.

consequence, but it also affords them no complete immunity as to any and all further conduct. The same error vitiates appellants' argument (Br. 41–42) that the orders of supervision increase penalties prescribed in other legislation. The penalties, obviously, are for a new and different offense. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, cited by appellants as denouncing administrative additions of penalties (Br. 42), in its actual holding found—as it must be found here—that no increase of penalties was involved (pp. 406–407).

Needless to say, the breadth of the delegated discretion is not to be tested by appellants' own extensive conjectures as to what an administrative official might suppose himself delegated to do. If, as insisted by appellants, the Attorney General should employ the right to require a medical examination, not for the obvious proper purpose of meeting the requirements of a country accepting deportees, but for "converting this subsection into an instrument of harrassment or oppression" (Br. 39), that would be no demonstration of any deficiency in the standard of delegation but rather a clear violation of it.

A variant of the same argument is the contention that the statute is subject to possible administrative abuse. Appellants cite as abuses the restrictions on area of travel and changes of residence from one immigration district to an-

other without permission (Br. 40–41), the requirement that information be given (Br. 46), and the question of the meaning of "from time to time" in connection with reporting, and "when necessary" in connection with physical examination (Br. 47). As pointed out *supra*, pp. 54–56, these are actually more specific as standards for administrative action than the statute involved in the *Carlson* case. The orders issued thereunder are even more specific. The reporting requirements have specified time and place and the restrictions on travel have specified definite mileage. When further information or physical examinations are required, the time, place, and nature of the requirements will be equally specific. Appellants' real challenge is thus not to the statute but to some terms of the orders, a matter we discuss *infra*, pp. 60–69. The statute, on its face, manifestly supplies sufficient guidance for the administrative action which must be taken before petitioners are ordered to do anything.

If the issue of the validity of the statute on its face is open for decision, that validity is so clear that there is no need to remand the cause to the District Court for adjudication. The statute is clearly a reasonable and proper method of keeping some mild control over a group of aliens who, although found to be deportable, have not as yet been deported. The treatment of such aliens as a special class is justified by their special status. The statute sets forth definite stand-

ards for administrative action in defining the terms of the supervision. It does not, however, punish on the basis of an administrative finding as such. Punishment will occur only if there is a finding by a court of a *willful* violation of the regulations pertaining to the special class. The fact that it is administratively determined that appellants are in that special class does not result in punishment without judicial trial. Appellants are thus not denied any constitutional rights by the supervision required by the statute.

III

THE ORDERS OF SUPERVISION ARE PROPER UNDER THE STATUTE

For the reasons set forth in Subpoint B of Point I, *supra*, pp. 29–32, the specific details of the orders of supervision are not now properly open for determination. Some of appellants' attacks on the orders are merely reiteration of their general contention that they should not be subject to any supervision whatsoever. Beyond that, their attacks are highly speculative and lack the concreteness which would bring them within the concept of a case or controversy. Furthermore, as discussed in Point I, appellants do not show that they have sought and been denied administrative clarification or amelioration of the details of such orders. This becomes up

parent when appellants' contentions are examined in detail.

1. If there is to be any supervision at all, it is manifestly reasonable to require some reporting by the aliens. Particularly is this so where one of the purposes of supervision is to prevent the aliens from concealing their identity and fading into the general population. The requirement for reporting once each week has been administratively changed to once each month at the central location of the District Headquarters of the Immigration and Naturalization Service at 70 Columbus Avenue in the heart of New York City (App. B, *infra*, p. 74), rather than weekly at Ellis Island as originally provided. Reporting is, of course, a normal condition of all forms of supervision.

2. As to the requirements that the alien notify of his change of residence and that he obtain permission before changing to another district, the justification for such requirements as a method of keeping informed is self evident. Comparable provisions are those requiring registration of aliens in the Immigration and Nationality Act of 1952, Sections 262-266, 66 Stat. 224-225, 8 U. S. C. A. 1302-1306, and the regulations requiring that selective service registrants notify draft boards of their address, 32 C. F. R. 1641.3, and obtain permission before leaving the country, 32 C. F. R. 1621.10. The prematurity of appel-

lants' attacks is well illustrated here. There is not and there cannot be any allegation that permission to change has been or will be arbitrarily denied.

3. The requirement that permission be obtained to travel outside of a radius of fifty miles is a precaution designed to assure that the alien remain identified and subject to supervision by the district office with a duty to supervise. Again appellants do not assert that reasonable applications have been denied or will be denied in the future. In fact, as the record shows, one of the appellants was promptly granted leave to remain in a distant resort for health purposes as soon as the need for such permission was called to the attention of appellee (R. 118-119, 131).

Appellants' argument (Br. 28) that any restriction of movement from place to place is a restriction on liberty is merely a facet of their argument that they should not be subject to any supervision whatever. As discussed in Point II, *supra*, pp. 30-46, if the aliens may reasonably be treated as a special group because of their special status, their freedom of movement may be restricted in a way which is reasonably related to that special status. In *Williams v. Fears*, 179 U. S. 270, 274-275, cited by appellants, the Court employed language recognizing liberty of movement but refused to invalidate a statute having the incidental effect of limiting laborers to go out of the state, saying "it is easy to see that if that

business is not subject to regulation, the citizen may be exposed to misfortunes from which he might otherwise be legitimately protected". Cases holding that a passport may not be arbitrarily revoked recognize that, even as to citizens, freedom to travel abroad is "subject to reasonable regulation and control in the interest of the public welfare". *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D. D. C.).

4. The provision for medical and psychiatric examination, attacked by appellants (Br. 30) although not yet invoked with respect to any of them (R. 132), serves the obviously necessary purpose of providing some of the facts as to health required by countries to which the United States may seek to deport aliens, and of providing facts required in some cases by the transportation agencies (R. 132).

A number of countries, like the United States itself, require assurances of the mental and physical health of persons seeking admission. Moreover, medical examination may become necessary if an alien claims illness as an excuse for failure to comply with the conditions of supervision or as a basis for modification of the reporting requirement or the restrictions on travel. This condition is plainly not imposed for punitive purposes but as a means of effectuating ultimate deportation, and, in the meantime, of protecting the security of the United States without unnecessary hardships to the alien. If the right should

ever be abused, that situation can be dealt with when it arises.

5. Since the right to supervise exists, it is reasonable to require that persons subject to supervision answer questions which will tend to show whether the various provisions are being obeyed. Moreover, it may be necessary to obtain information sought by foreign countries. The premature, speculative nature of appellants' attacks on the details of the supervision orders is nowhere better illustrated than in their speculations as to what might occur in connection with such examination. The suggestions that appellants may be required to make self-incriminating disclosures have no foundation in presently existing facts with respect to a concrete case. When a request for such information is made of appellants, there will then be an opportunity for them to raise the privilege, to obtain a ruling thereon, and if it be adverse, to have the issue tested in the courts. Similarly, if, as appellants speculate, irrelevant questions are asked of them, that issue can be determined in relation to concrete facts. The orders of supervision refer merely to the furnishing of "such information as may be deemed fit and proper" (R. 15). The suggestion that some irrelevant questions may be asked does not show that there should not be any right to ask questions at all.

6. The provisions against further support of the Communist Party and of associations that

might cloak such support (a provision specifically not to apply, however, to association with the alien's family or legal counsel) is clearly directed toward a plain and proper purpose. If an alien may be expelled for his Communist Party activities (*Galvan* v. *Press*, 347 U. S. 522), it is reasonable to provide that those whose expulsion has been delayed shall not be afforded opportunity by that circumstance to carry on the very activities which have led Congress to order their expulsion.

Appellants argue (Br. 29–30) that in some cases the supervision requirements have resulted in loss of former, more advantageous means of employment (as, in some examples, employment by the Communist Party). Of course appellants could not have continued in their positions if they had been deported at an earlier time. Congress cannot be required to assure an alien that after he has been found undesirable all is to continue on exactly the same basis as before, especially when the previous way of life involved the type of activity which was the reason for the expulsion.

Appellants particularly attack this provision as vague, professing inability to know what is required of them. We submit, however, that upon no reasonable analysis can there be confusion as to what is and what is not to be under this provision. First, there is clearly excluded from

the order any prohibition against associating with members of the family or professional legal counsel.[10] With this limitation it is ordered (R. 13–14):

> (a) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign state, or of any political or geographical subdivision of any state, any section, subsidiary branch, affiliate, or subdivision of any such group or organization.
>
> (b) That such alien shall refrain from "associating" with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (a) above, * * *.

Appellants in their affidavits pose in substantially identical language an array of conjectural problems as to what constitutes "support", what constitutes a "doctrine" or "policy" of the Com-

[10] (R. 14): "the term 'associating' as used in this subparagraph shall not be construed to include members of such alien's family or professional legal counsel if such associations are not used in furtherance of the doctrines, policies, or activities of any of the organizations or activities mentioned in subparagraph (a)."

munist Party; what constitutes an "affiliate" of the Party; and what is meant by "associating" (e. g., R. 22–23; see Br. 45). The answer to this type of argument is that, in all but the extreme borderline of areas of conduct, appellants will know very well whether they are helping the Communist Party and its policies. They will thoroughly know what they are up to in any contacts with other persons and they will know with whom they are associating. Any genuine slip-up or misunderstanding will be subject to the statutory requirement that their violation be willful or knowing. Moreover, they can place doubtful cases before the administrative authorities."

"We find no reasonable similarity in such cases as those cited by appellants in their brief at pp. 43–45. *Stromberg v. California*, 283 U. S. 359, 369, involved a prohibition against a sign "in opposition to organized government"; it was because this could include orderly opposition that the provision was held invalid. *Musser v. Utah*, 333 U. S. 95, 97, involved a statute penalizing any act "injurious to public morals", but the matter was remanded, as the state court was to be afforded opportunity to interpret the statute more precisely (as, in the instant case, the administrative authorities should first be afforded opportunity to interpret their own orders). *Lanzetta v. New Jersey*, 306 U. S. 451, involved a statute penalizing "gangsters", the definition including the phrase, a member of any "gang" consisting of two or more persons. *Connally v. General Const. Co.*, 269 U. S. 385, involved the "current rate of per diem wages in the locality where the work is performed." *United States v. Cohen Grocery Co.*, 255 U. S. 81, involved, without further standards, "unjust or unreasonable rate or charge" and "excessive prices for any necessaries." In *United States v. Cardiff*, 344

Beyond this, appellants' complaint is not one of inability to understand what is required of them but rather an obdurate insistence that they should not be required to desist from the clearly proscribed associations and to take adequate steps to avoid such associations.

Appellants are not entitled, upon complaint of vagueness, to be furnished an impossibly precise guide-line which they can press to the utmost in technical ingenuity and avoidance. The substance of what is asked of them is clear; if, instead of sincere effort at compliance, they choose to test the outermost limits of the relatively general freedom still accorded them, their possible criminal involvement will be no product of vagueness in the order but of their own recklessness. The appropriate principle was stated in *United States* v. *Wurzbach,* 280 U. S. 396, 399:

> * * * Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. * * *

U. S. 174, a statute permitted entry by government inspectors upon making request and obtaining permission. It was held that the requirement that an owner *grant* permission was not clearly enunciated in the statute, and that, accordingly, the owner could not be convicted for refusal to grant permission.

The above analysis makes clear that appellants' attacks on the orders of supervision, insofar as they involve anything more than the general contention that appellants should not be subject to supervision at all, have no foundation in existing facts. Even if there were more merit in them than has yet been shown, they are not ripe for adjudication at this time.

CONCLUSION

For the reasons stated above, we respectfully submit that the judgment below should be affirmed. If, however, this Court should be of the opinion that a justiciable case or controversy is presented and that the case, as thus far presented, does not afford an adequate basis for rejection of appellants' contentions on the merits and affirmance of the judgment below, the case should be remanded to the District Court for further appropriate proceedings.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO JUSTICIABILITY

Article III, Section 2, of the Constitution in pertinent part provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—* * * to Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Federal Declaratory Judgment Act, as codified in 28 U. S. C. 2201, and as amended August 28, 1954, 68 Stat. 890, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1009, in pertinent part provides:

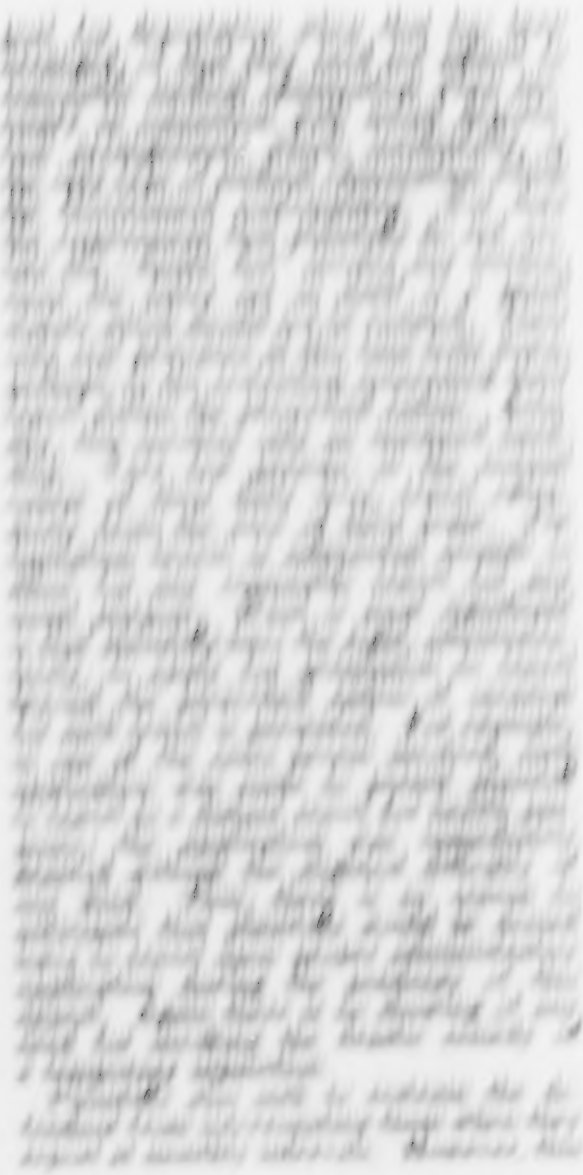
> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

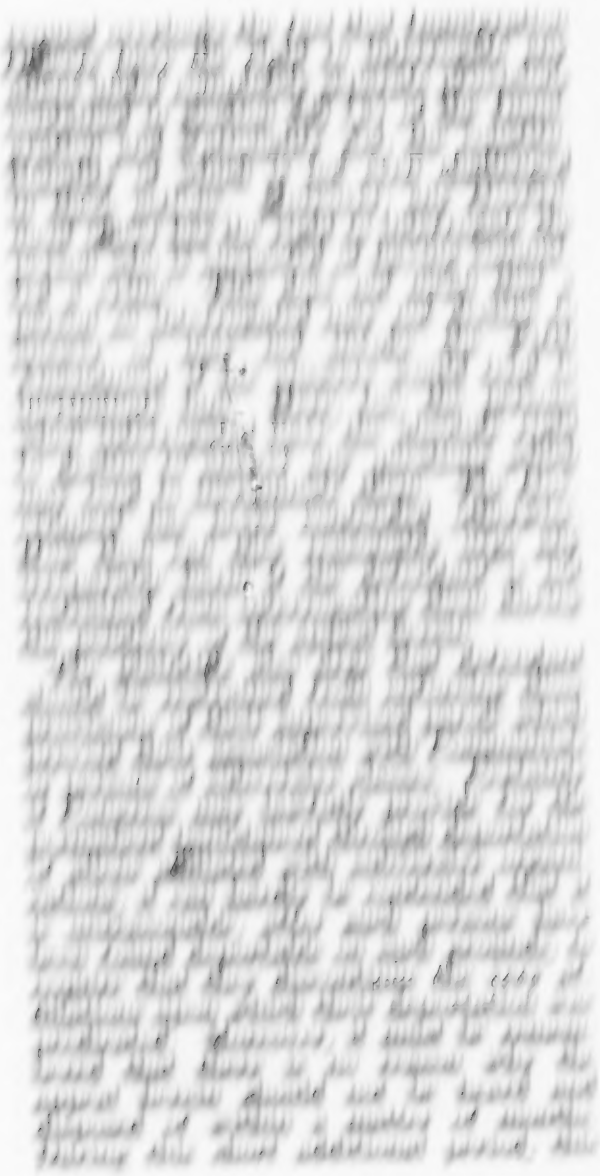
action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise





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not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.

These basic principles have received further confirmation in both the extensive analysis appearing in the concurring opinion of Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 149–160, and in the Court's decision in International Longshoremen's Union v. Boyd, 347 U. S. 222. In Mr. Justice Frankfurter's Joint Anti-Fascist analysis, he lists numerous elements indicating lack of justiciability which appear in the instant case. Among them is the question whether the action has "come to rest" or whether the impact of the government action will at a future time "become more conclusive, definite or substantial" (341 U. S. at 154, and fn. 4). Included also is a reference to the practice of "evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief" (341 U. S. at 153).

In the instant case, controlling hardship in denial of judicial relief is not established by the fact, common to citizens and aliens alike, that violation of the law may lead to a criminal prosecution. Cf. Douglas v. Jeannette, 319 U. S. 157, 163. A case cannot virtually be assumed into existence by a preliminary assumption that a needed and reasonable modification of the suspensory arrangements would be arbitrarily denied by the administrative authorities, or that, in the event of an inadvertent violation, or of a

sincere and appropriate challenge of the requirements, a ruinous penalty would either be asked by the government or imposed by a court. Furthermore, it should be noted that the penal provision of the statute (*supra*, p. 5) requires that the offenses be "willfully" or "knowingly" committed.

In *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222, this Court dealt with the complaint of resident aliens who went to Alaska each summer to work in the canneries and who were confronted with an interpretation under the 1952 Immigration and Nationality Act whereby they would be subjected, upon return, to the grave political consequences of being considered as if they were aliens entering the United States for the first time. Their complaint was ordered dismissed by this Court as not yet being a suit to enforce a right. To establish justiciability there must be an immediate, actual adverse effect, within the context of an existing concrete case. See particularly, 347 U. S. at 224, quoted *supra*, p. 34.

Two subsequent decisions have further demonstrated the requirement that the status of an actual, rather than future, controversy be involved. In *United States* v. *Harriss*, 347 U. S. 612, this Court, while passing upon the constitutionality of the Lobbying Act with respect to certain things already done by the appellees, refused to pass upon the constitutionality of a provision imposing specific disabilities after a first conviction. There, as here, there was vigorous contention that the added penalty would have

immediate present effect, rather than merely contingent future operation (O. T. 1953, No. 32, Br. of Appellee Harriss, pp. 6–7, 19–20), but the Court rejected the contention, pointing out that if, for example, appellees were found innocent of the first offense, the further provision would not be applied against them (347 U. S. at 627).

In *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 336, this Court very recently held that a railroad was not entitled to judicial relief where it complained of a proceeding of the National Railroad Adjustment Board upon the ground that notice had not been given in the proceeding to a necessary party. The relief was sought prior to any decision on the merits by the Board, and the Court, despite the vigorous opinion of the Court of Appeals to the contrary in 212 F. 2d 22, 28–29, pointed out, *inter alia*, that the Board's award might ultimately be one which would be devoid of adverse effect on the railroad. 349 U. S. at 373.

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